No. 90-5319-CSY
Status: GRANTED

Title: Paul McNeil, Petitioner
v.
Wisconsin

Docketed:
July 30, 1990

Court: Supreme Court of Wisconsin

Counsel for petitioner: Luck,Gary M.

See also:
90-6237

Counsel for respondent: Becker,David J.

Entry	Date	Note	Proceedings and Orders
1	Jul 30 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 16 1990		Brief of respondent Wisconsin in opposition filed.
4	Aug 23 1990		DISTRIBUTED. September 24, 1990
6	Sep 28 1990		REDISTRIBUTED. October 5, 1990
8	Oct 15 1990		REDISTRIBUTED. October 26, 1990
10	Oct 29 1990		Petition GRANTED.
			**********
11	Nov 9 1990	G	Motion of petitioner for appointment of counsel filed.
12	Nov 19 1990		DISTRIBUTED. November 21, 1990.
13	Nov 26 1990		Motion for appointment of counsel GRANTED and it is ordered that Gary M. Luck, Esquire, of Milwaukee, Wisconsin, is appointed to serve as counsel for the petitioner in this case.
14	Dec 6 1990		Joint appendix filed.
15	Dec 10 1990		Brief of petitioner McNeil filed.
16	Dec 17 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 26, 1991. (2ND CASE)
17	Dec 17 1990		Record filed.
		*	Supreme Court of WI-one volume
19	Dec 21 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Jan 8 1991		Brief amici curiae of Americans for Effective Law Enforcement Inc., et al. filed.
20	Jan 9 1991		Brief amici curiae of Florida, et al. filed.
21	Jan 10 1991		Brief amicus curiae of Illinois filed.
23	Jan 10 1991		Brief of respondent Wisconsin filed.
22	Jan 11 1991		Brief amicus curiae of United States filed.
24	Jan 11 1991		Brief amicus curiae of Appellate Committee of California District Attorneys Assn. filed.
25	Jan 17 1991		CIRCULATED.
27	Jan 22 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
28	Feb 7 1991	X	Reply brief of petitioner McNeil filed.
29	Feb 26 1991		ARGUED.

ORIGINAL

CASE NO. 90-5319

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL McNEIL,

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

RECEIVED

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DATED this 27th day of July, 1990

QUESTION PRESENTED

1. Was the Petitioner McNeil's acceptance of assistance of counsel and appearance with counsel at an initial appearance on a charged offense of armed robbery an invocation of McNeil's fifth amendment right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide while the accused was in continuous custody?

PARTIES

The petitioner in this Court is Paul McNeil who was the defendant in the case below, and the appellant in the appeal proceedings in the Wisconsin Court of Appeals and Wisconsin Supreme Court of the question which is the only matter on appeal. The respondent is the State of Wisconsin, which was the plaintiff in the trial court and the respondent in the appellate proceedings below.

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United States Code

Title 28, §1257 (a) 2

CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL McNEIL

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner Paul McNeil respectfully prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Wisconsin in the case of The State of Wisconsin v. Paul McNeil, entered on May 2, 1990.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court in this case (State v. McNeil) is reported at 155 Wis.2d 24, 454 N.W.2d 742 (1990); a copy of the opinion is included in the Appendix at A-1. The certification of the Wisconsin Court of Appeals, District II, was unreported; a copy of the certification is included in the Appendix at A-32. The opinion of the trial court for Racine County, Wisconsin, was unreported; a copy of the unreported decision is included in the Appendix at A-30.

JURISDICTION

The judgment of the Wisconsin Supreme Court affirming the trial court was entered on May 2, 1990. Rehearing was not sought. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

> "No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the District wherein the crime shall have been commited, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On May 20, 1987, two Milwaukee County deputy sheriffs had contact with Paul M. McNeil in Omaha, Nebraska where McNeil was being detained pursuant to a Milwaukee County, State of Wisconsin, warrant for armed robbery. The detectives were aware that McNeil was also a suspect in a homicide that occured in the town of Caledonia, Racine County, Wisconsin. The deputy sheriffs advised McNeil of his Miranda rights. The defendant chose to remain silent. On May 21, 1987, McNeil was returned to Milwaukee, Wisconsin pursuant to the armed robbery warrant.

On May 22, 1987, McNeil appeared before a Milwaukee County Judicial Court Commissioner with his attorney, a State Public Defender. Bail was set and the matter was scheduled for preliminary examination concerning the armed robbery.

On that same day, May 22, 1987, in the evening hours a Milwaukee County detective initiated a visit to McNeil's cell in the Milwaukee County Jail and began an interrogation of him. McNeil was questioned concerning the Caledonia homicide. McNeil denied participation in the homicide. The deputy sheriff informed McNeil that he was dissatisfied with McNeil's answers and would return for further interrogation. Subsequently, the detective returned with other detectives from the City of Milwaukee Police Department and a Town of Caledonia police officer. The subsequent interrogations occured on May 24 and May 26 while the defendant was in continous custody in the Milwaukee County Jail. These interrogations resulted in statements which became the basis for McNeil being charged with first degree murder, attempted first degree murder, and armed burglary in Racine County. These charges were issued on May 27, 1987.

Subsequently McNeil was brought before a Magistrate in Racine County and his case was scheduled for trial. McNeil filed motions amongst which was a motion to suppress any statements which McNeil made while in continuous custody in the Milwaukee County jail. The motion to suppress the statements was denied. As a result of the denial of the supression motion, McNeil entered pleas of no contest and judgment was entered on March 19, 1988 against McNeil for convictions of party to a crime second degree murder, party to a crime attempted first degree murder, and party to a crime armed burglary. McNeil was sentenced to a term of not more than 20 years for party to a crime second degree murder, 20 years for party to a crime attempted first degree murder, and 20 years for party to a crime armed burglary, all sentences to be served consecutive to one another for a total of 60 years.

Subsequently, McNeil filed post trial motions requesting the right to withdraw his no contest plea. This motion was denied. (A-30)

McNeil filed a notice of appeal to the Court of Appeals, for the State of Wisconsin. The Court of Appeals for the State of Wisconsin requested certification to the Wisconsin Supreme Court of the issue concerning a defendant's fifth amendment right not to be interrogated on unrelated charges while in continuous custody after appearing with counsel at an initial appearance. The Court of Appeals determined that the State of Wisconsin had not ruled on this issue. The Wisconsin Supreme Court pursuant to its discretion determined that certification should be granted and took jurisdiction of the appeal.

COURT HISTORIES

A. The Trial Court

McNeil was able to establish through an uncontroverted affidavit that the sole basis for entering a no contest plea to the homicide, attempted homicide, and armed

burglary charge was the denial of his motion to suppress his statements. In his post conviction motion to the trial court McNeil brought to the trial court's attention the case United States ex rel Espinoza v. Fairman, 813 F.2d 117 (7th Cir.1987), cert. denied, Fairman v. Espinoza, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 745 (1987). The trial court in the original suppression hearing had not been made aware of the Espinoza decision. In Espinoza, the 7th Circuit Court of Appeals expressly held:

> "That individuals who invoke their right to counsel at their arraignment are invoking both their sixth amendment and their fifth amendment rights." Espinoza, Fed.2d at 123

The Wisconsin trial court after reviewing Espinoza explicitly held that:

> "The court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case (Espinoza) would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied." (A-31)

B. The Court of Appeals

The Court of Appeals pursuant to Wisconsin Appellate Procedure certified McNeil's appeal to the Wisconsin Supreme Court. The Court of Appeals reached this decision after an analysis of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981); Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed. 2d 631 (1986); Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed. 704 (1988), and Espinoza. The Court of Appeals concluded that the United States Supreme Court had never directly ruled on whether individuals who invoke their right to counsel at their arraignment, or initial appearance, are invoking not only their sixth amendment right but their fifth amendment right to have counsel present during any subsequent in-custody police initiated interrogation. (A-41)

C. The Wisconsin Supreme Court

In a 4-3 decision, the Wisconsin Supreme Court affirmed the ruling of the trial

court holding that Espinoza should be rejected. The Wisconsin court would have reversed the trial court if it chose to follow the Espinoza holding. In passing, the majority cited Butler v. McKellar, __U.S.__, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), noting that the Butler decision concerned retroactivity, not an issue in McNeil's appeal. The majority did not interpret Butler as changing Roberson, and found no application for Edwards or Jackson in the defendant's situation:

> "Although proponents of Espinoza and cases following the holding in Espinoza might interpret Butler as changing Roberson to affect an outcome on the certified issue now before us that is on all fours with Espinoza, we disagree. We continue to interpret Roberson to apply only to the invoked fifth amendment prophylactic protection of 'having an attorney present to counteract the inherant pressures of custodial interrogation....' Roberson, 486 U.S. at 685, 108 S.Ct. at 2100.
>
> We do not read Butler and Roberson as affecting a transmutation of the sixth amendment right to counsel into a fifth amendment right to counsel. We hold that a defendant does not invoke his or her fifth amendment right to counsel by invoking the sixth amendment right to counsel at an initial appearance." McNeil, Wis.2d at 35,36 (A-12,13)

Chief Justice Heffernan writing on behalf of the three dissenters was persuaded by the reasoning of the Espinoza decision and urged that when a defendant requests an attorney at an initial appearance and remains in custody, the court should presume that the defendant has invoked his fifth amendment right to counsel, and police initiated interrogation on any crime is therefore prohibited. The dissent also disagreed with the majority view of the impact of Butler. The dissent interpreted Butler as an approval of the Espinoza analysis that a defendant invokes his fifth amendment right to counsel when he requests assistance of counsel at an initial appearance, thereby prohibiting police initiated interrogation. The dissent urged Wisconsin law enforcement officers to comply with the Espinoza standard whenever a suspect is interrogated under circumstances similar to McNeil's, or risk the result of a suppression of crucial evidence. McNeil, Wis.2d at 52 (A-29)

I. THE WRIT SHOULD BE GRANTED BECAUSE THE WISCONSIN SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH CONFLICTS DIRECTLY WITH A DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS

The decision of the Wisconsin Supreme court in the McNeil case has created a real and intolerable conflict concerning a matter of constitutional law between the State of Wisconsin and the Seventh Circuit Court of Appeals. The Wisconsin majority framed the issue in the McNeil matter as:

> "Whether an accused's request for or appearance with counsel at an initial appearance on a charged offense constitutes an invocation of his fifth amendment right to counsel that precludes police initiated interrogation on unrelated, uncharged offenses." McNeil, Wis.2d at 28 (A-5,6)

The majority answered no. The Wisconsin Supreme Court decision begins with an analysis of Edwards, ("when a suspect invokes his fifth amendment right to counsel during a custodial investigation, no further interrogation may be commenced by the authorities until counsel has been made available to him, unless he, himself initiates further communication, exchanges, or conversations with the police." Edwards, at U.S. 484-85, 101 S.Ct. at 1884-85) cited in McNeil, Wis.2d at 32 (A-9); Roberson, ("in the fifth amendment context, an invocation of the right during custodial interrogation precludes further questioning on any offense, not just the one that was the subject of the interrogation." Roberson, at U.S. 675, 685, 108 S.Ct. 2093, 2100, 100 L.Ed. 2d 704 (1988) cited in McNeil, Wis. 2d at 34 (A-11); and Jackson ("The invocation of right to counsel at an initial appearance will therefore trigger the Edwards rule." Jackson, 475 U.S. 625, 636, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)), cited in McNeil, Wis.2d at 33 (A-10)

After analyzing the above Supreme Court cases the Wisconsin majority turned its attention to the Espinoza decision. The Court was fully cognizant that the Seventh Circuit Court of Appeals in Espinoza expressly held that:

> "...individuals who invoke their right to counsel at their arraignment are invoking both their sixth amendment and fifth amendment rights." McNeil, Wis.2d at 34 (A-11)

The Wisconsin majority, though, rejected Espinoza holding that Espinoza incorrectly interpreted Jackson, and that Espinoza was not a decision that had precedential value in the State of Wisconsin. McNeil, Wis.2d at 35 (A-12)

In rejecting Espinoza the Wisconsin majority had to confront Butler v. McKellar, __U.S.__, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). (For the remainder of the Petition, this Court'd decision shall be referred to as McKellar to avoid confusion with the Fourth Circuit Court of Appeals Butler decisions, infra.) McKellar was decided after oral argument on the McNeil matter was had in the Wisconsin Supreme Court, but before the Wisconsin Supreme Court rendered the McNeil decision. In reviewing McKellar, the Wisconsin majority recognized that McNeil was on direct appeal, and that the holding of McKellar dealing with collateral attack as it arose in McKellar was not applicable. The majority, though, was aware that the dissenters in the McNeil decision were proponents of Espinoza who interpreted McKellar as consistent with Espinoza "on all fours." McNeil, Wis.2d at 35 (A-12) The Wisconsin majority disagreed. The majority chose to disregard language in McKellar which was analyzed by the dissenters in McNeil as support for the Seventh Circuit Court of Appeals decision in Espinoza.

The conflict that has arisen between the Wisconsin Supreme Court decision in McNeil and the Seventh Circuit Court of Appeals in Espinoza could not be more stark. The conflict affects unknown numbers of defendants presently awaiting trial, on direct appeal, and presently under investigation. As Chief Justice Heffernan wrote in the dissent in McNeil:

> "It would appear to this writer to be prudent to follow Espinoza by assuming that defendant's who request assistance of counsel at an initial appearance and remain in custody have thereby invoked their fifth amendment right to counsel and police initiated interrogation is thereafter prohibited in respect to any crime unless the suspect waives his right to counsel." McNeil, Wis.2d at 52 (A-29)

The dissent concern is both with individual consitutional rights under the fifth amendment, and with the orderly administration of criminal justice in the State of Wisconsin. These concerns touch upon fairness and predictability and their perception by participants in the criminal justice system including judges, police officers, attorneys, victims, witnesses, and defendants. The dissent appears acutely aware of the obvious conflict: The Wisconsin Supreme Court rules a statement is admissable and the Seventh Circuit Court of Appeals rules that the same statement is not admissable at trial. The dissent appears aware of those defendants able to petition the appropriate Federal Courts in Wisconsin for relief from tainted confessions which have been ruled admissable by the Wisconsin Supreme Court in McNeil. As the dissent states:

> "Reliance on the majority's view of what constitutes a constitutionally antiseptic confession may result in the suppression of crucial evidence." McNeil, Wis.2d at 51 (A-28)

The dissent signals that the only forum for a defendant in the State of Wisconsin after the McNeil decision (that would suppress a confession such as McNeil's) would be the Federal District Courts applying the rule of Espinoza, and the Seventh Circuit Court of Appeals. The clash between the highest court of the State of Wisconsin and the Seventh Circuit Court of Appeals is not theoretical but a reality. The result for the administration of criminal justice in Wisconsin can only be chaotic.

Only the Supreme Court of the United States can prevent this chaotic situation for law enforcement officials, judges, defendants and attorneys in the State of Wisconsin. On one hand, they are told by the Supreme Court of the State of Wisconsin that police can interrogate defendants in custody who have requested assistance of counsel at an initial appearance; conversely, the Seventh Circuit Court of Appeals has announced to all law enforcement officials, judges, defendants and attorneys in Wisconsin that they may not conduct such interrogation.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE WISCONSIN SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT

In rejecting the Espinoza decision, the Wisconsin Supreme Court correctly asserts that other jurisdictions agreed with their holding. In expressly rejecting the analysis of Espinoza, the Michigan Supreme Court in People v. Crusoe, 433 Michigan 666, 449 N.W.2d 641, 651 (1989) stated:

> "We find no authority for the adoption of a rule that a defendant's request for court appointed counsel at an arraignment invalidates a waiver of the defendant's right to counsel per se under Miranda during a subsequent police-initiated interrogation concerning a different and unrelated offense."Crusoe, at N.W.2d 651, citing United States v. Roberts, 869 Fed.2d 70, 74 (2nd Cir. 1989)

The Supreme Court of Michigan explicitly disagreed with the Espinoza decision.

> "We disagree with the conclusion reached by the Espinoza court upon which the Court of Appeals relied that from Jackson, which bars police initiated interrogation after indictment in the absence of counsel, it follows that once an accused's sixth amendment right to counsel attaches his fifth amendment rights become unwaivable in the context of a separate investigation."Crusoe, N.W.2d at 650

The Wisconsin Supreme Court also found support in the State of Washington. In State v. Stewart, 113 Wash.2d 462, 780 P.2d 844, 853 (1989) the Washington court stated:

> "In the end, we hold Stewart's sixth amendment right to counsel did not attach on these burglary charges until months after his confessions. He did not invoke his fifth amendment right to counsel when he requested an attorney at an arraignment on an unrelated charge." (Emphasis Added) The fifth amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation, which was not occuring at the times Stewart requested counsel. Subsequently, prior to getting his confession, Stewart was given Miranda warnings and did not invoke his fifth amendment right at that time. There has been no show of confusion on the part of the defendant, nor trickery on the part of the State. Extension of the Edwards rule to this fact scenario whould constitute a misapplication of that prophylactic rule. Stewart, P.2d at 853

The court in Stewart took note that Espinoza was mistaken when the Seventh Circuit Court of Appeals relied on Jackson, wherein the Seventh Circuit held that an individual has invoked the full extent of his or her constitutional right to counsel when invoking the right to counsel at an arraignment. The Stewart decision analyzed the error in Espinoza as follows:

> "The flaw in this analysis is that there is no basis from which to assume the invocation of the fifth amendment right to counsel in an arraignment setting. It will be recalled, Michigan v. Jackson, supra, invoked solely the sixth amendment right to counsel." Stewart, P.2d at 851

On the other hand, the Supreme Court of Wisconsin could have deferred to other jurisdictions that have affirmed Espinoza and Roberson and viewed those cases as the proper interpretation of fifth amendment rights in the context of an arraignment or initial appearance. State of Vermont v. Preston, 150 Vt. 511, 555 A.2d 360 (1988) involved a defendant arrested in Florida and arraigned as a fugitive from justice. At arraignment on that charge he requested counsel and the court appointed a public defender. Vermont investigators, upon their arrival in Florida, were informed that the defendant had been assigned counsel on the fugitive from justice charge, but proceeded to question the defendant concerning a homicide in the absence of counsel. The defendant eventually confessed his guilt as to the homicide.

The Vermont Supreme Court held that defendant's "invocation of his fifth amendment right remained effective at the time of the interrogation, and that, because the State impermissably initiated that interrogation, his purported waivers of this right were invalid." Preston, A.2d at 363. The Vermont court relied directly upon the Espinoza decision affirming the Espinoza courts reasoning that:

> "...it must be presumed that a defendant who requests or accepts counsel at an arraignment is invoking both his sixth amendment and fifth amendment rights." Preston, A.2d at 362

In Sutherland v. Arkansas, 299 Arka. 86, 771 S.W.2d 264 (1989) the Supreme Court of Arkansas was confronted with a case in which the defendant had been appointed an attorney at his arraignment for a drug charge. Four days after his arrest the police brought the petitioner from his cell and questioned him concerning burglaries. The defendant confessed to a burglary and was subsequently convicted. The Arkansas court did not take note of Espinoza. Rather the Supreme Court of Arkansas relied on Roberson, stating:

> "Since the petitioner had been appointed counsel at his arraingment on the drug charges, his subsequent waiver of his right to counsel, after the police initiated the interrogation with respect to the burglary, was invalid." Sutherland, S.W.2d at 266

It appears from these cases that there is a great division among state courts of last resort concerning the constitutional propriety of police initiated interrogations of detained defendants who are represented by counsel, or who have requested representation of counsel at an initial appearance or arraignment. The division amongst the States is not one of nuance. The division amongst the States is based on explicitly contrary interpretations of this Court's prior decisions in Edwards, Jackson, and Roberson. Only this Court can resolve this issue and bring to an end the intolerable situation of a confession not admissable in Arkansas or Vermont being admissable in Michigan, Washington or Wisconsin.

III. THE WRIT SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER

The McNeil decision in rejecting Espinoza looked to another Circuit Court of

Appeals to find support. Turning to the Second Circuit Court of Appeals, the Wisconsin court cited United States v. Roberts, 869 Fed.2d 70, 74 (2nd Cir. 1989) which had relied on Edwards, Jackson, and Roberson for its analysis of the relationship between sixth and fifth amendment rights. In Roberts, the court had said:

> "Roberts would have us hold that once an accuseds' sixth amendment right to counsel attaches, his fifth amendment rights become unwaivable in the context of a separate investigation. Such a conclusion comports with neither the letter nor the spirit of Edwards and its progeny." Roberts, Fed.2d at 74

The Michigan Supreme Court in Crusoe also relied on Roberts in rejecting the Espinoza analysis.

In Butler v. Aiken, 846 Fed.2d 255 (4th Cir. 1988), and Butler v. Aiken, 864 Fed.2d 24 (4th Cir. 1988) cases which involved the same defendant, the Fourth Circuit Court of Appeals has also dealt with the issue McNeil presents to this Court. The issue before the Court of Appeals in the first Butler case was whether the Espinoza decision "required the police, during continuous custody, to refrain from all further questioning on any offense once an accused invokes his right to counsel" McNeil, Wis.2d at 51 (A-28)

The Fourth Circuit Court of Appeals in the first Butler holding analyzed Espinoza and rejected Espinoza. Subsequently this Court decided Roberson. The Fourth Circuit taking note of Roberson on Butler's motion for reconsideration determined that Roberson had cast into "immediate and serious doubt" its prior decision rejecting Espinoza. Butler v. Aiken, 864 Fed.2d 24, 25 (1988). Responding to the State of South Carolina's attempt to distinguish Roberson the Court of Appeals stated:

> "As an initial matter, we reject respondents' effort to distinguish Roberson factually. We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights. The subsequent interrogation concerning the Lane murder occurred during

> continuous custody, was contrary to the Edwards rule as modified in Roberson. If this case were before us on direct appeal, we would in all likelihood be compelled to reverse the conviction and remand for a new trial." Butler v. Aiken, 864 Fed.2d 24 at 25. (1988)

The Sixth Circuit Court of Appeals has also followed the reasoning set forth in Espinoza. In United States v. Wolff, 879 Fed.2d 1320 (6th Cir. 1989) the majority found that the defendant's request for counsel at arraignment invoked not only the sixth amendment right to counsel, but also the right to have an attorney present to protect the fifth amendment right against self incrimination thereby prohibiting interrogation of the defendant if the defendant has remained in custody. The court in Wolff determined that this rule would apply to in-custody interrogation not only of the charged crime but unrelated crimes as was the case in Wolff.

The conflict amongst the Federal Circuits is real, and intolerable. McNeil's statement which would be suppressed in the Seventh Circuit, the Sixth Circuit, and presumably the Fourth Circuit (the language deferring to Roberson was somewhat equivocal), would be admissable in the Second Circuit Court of Appeals. Fundamental fairness requires that statements of defendants involving fifth amendment rights should be judged by the same standards in all the Federal Circuits of the United States. The perception of the Administration of justice by law enforcement officers and the public also requires that the Circuits treat uniformly the fifth amendment right as raised by McNeil. Only this Court can bring about the uniformity in law enforcement and judicial decision making that is necessary to maintain fairness and confidence in the Federal Administration of criminal justice.

IV. THE WRIT SHOULD BE GRANTED BECAUSE THE WISCONSIN SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

In Roberson the United States Supreme Court directed its attention to the conflicts that existed amongst the federal circuits and state courts concerning the reach of Edwards. The Court in a footnote cited Espinoza as standing for one of the circuits seeking to extend Edwards. Roberson, U.S. at 679, note 3, 108 S.Ct. at 2097 note 3. Roberson held that when a suspect requests counsel, the fifth amendment bars police initiated interrogation on any crime, even one which was not the subject of the original interrogation. The Fourth Circuit Court of Appeals in Butler v. Aiken, 846 Fed.2d 255 (4th Cir. 1988) had, prior to Roberson, rejected Espinoza's interpretation of Jackson. The decision in Roberson had an immediate impact on the Fourth Circuit. In rehearing, the Fourth Circuit stated in light of Roberson that the earlier decision rejecting the Espinoza rationale was doubtful. Butler v. Aiken, 864 Fed.2d 24, 25 (4th Cir. 1988)

The Butler v. Aiken rehearing was heard by this Court as Butler v. McKellar supra which was a decision concerned with retroactivity. In the course of its decision, though, this Court implicitly approved of Espinoza when it stated in McKellar:

> "The interrogation of Butler, while unquestionably contrary to present 'guidelines' was conducted in strict accordance with established law at the time." McKellar, at 108 L.Ed.2d 347, 354

In dealing with the application of Roberson as interpreted in McKellar, the Wisconsin Supreme Court majority chose to read McKellar as nothing other than a case dealing with the issue of retroactivity. The Wisconsin Court's concept of the fifth amendment right to counsel in McNeil is thus confined to that of a defendant being advised by a police officer of his right to counsel only during actual custodial interrogation. McNeil, Wis.2d at 33 (A-10) The Wisconsin majority, in McNeil, unlike the

Espinoza court, refuses to recognize a defendants request for assistance of counsel before a Magistrate as invoking any fifth amendment right. The Wisconsin majority is clear that at an initial appearance the defendant is not subject to interrogation and therefore could only be invoking his sixth amendment right and not his fifth amendment right when he appears with counsel. McNeil, Wis.2d at 36 (A-13)

But this Court has applied the Roberson decision to a situation strikingly similar to Espinoza and McNeil. In United States v. Wolff, 879 Fed.2d 1320 (6th Cir.1989) the Sixth Circuit Court of Appeals adopted the Espinoza decision as it pertains to invocation of right to counsel at arraignment triggering fifth amendment rights. The path that the Sixth Circuit took to arrive at that decision was not straight forward but involved a directive from this Court.

The defendant Wolff had been arrested for theft and possession of forged instruments. Wolff was appointed counsel at arraignment. Subsequently while in custody Wolff was interrogated by government agents and she confessed to involvement in a murder conspiracy. The Sixth Circuit initially ruled the confession admissable in an unpublished order affirming Wolff's conviction. Wolff filed a Petiton for Writ of Certiori which this Court granted vacating the Sixth Circuit unpublished order and remanding the matter to the Sixth Circuit Court of Appeals for further consideration in light of this Court's decision in Roberson. U.S. v. Wolff, __ U.S.___ 109 S.Ct. 39, 102 L.Ed.2d 18 (Oct. 3, 1988). It was only after the Sixth Circuit Court of Appeals had received the Oct. 3, 1988 order from the United States Supreme Court that it reversed its earlier decision and approved of the Espinoza holding concerning the invokation of fifth amendment rights at an arraignment. Apparently, the Wisconsin Supreme Court, absent a directive from the United States Supreme Court, does not feel compelled to reverse the trial court on the matter of McNeil's statement.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted,

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DATED this 27th day of July, 1990

APPENDIX

STATE of Wisconsin, Plaintiff-Respondent.

v.

Paul McNEIL, Defendant-Appellant.

Supreme Court

No. 89-1639-CR. Argued January 26, 1990.—Decided May 2, 1990.

(On certification from the court of appeals.)

(Also reported in — N.W.2d —.)

1. **Constitutional Law §320.10*—criminal prosecution—right to counsel—Fifth Amendment.**

   Fifth Amendment right to counsel applies whenever criminal accused is subjected to custodial interrogation irrespective of whether or not he or she has been formally charged with offense to which interrogation relates.

2. **Constitutional Law §320.10*—criminal prosecution—right to counsel—privilege against self-incrimination.**

   Right to counsel is not directly conferred by Fifth Amendment, but rather is prophylactic rule designed to safeguard privilege against self-incrimination that is directly conferred by Fifth Amendment.

3. **Custody of the Law §320.10*—criminal prosecution—right to counsel—Sixth Amendment.**

   Guarantee of assistance of counsel in criminal proceedings is directly conferred on accused by Sixth Amendment.

4. **Constitutional Law §320.10*—criminal prosecution—right to counsel—time of attachment.**

*See Callaghan's Wisconsin Digest, same topic and section number.

   Sixth Amendment right to counsel attaches only at or after time that judicial proceedings have been initiated against accused whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

5. **Constitutional Law §320.10*—criminal prosecution—right to counsel—applicability.**

   Sixth Amendment right to counsel is only applicable to interrogation that occurs subsequent to initiation of formal judicial proceedings relating to charge about which interrogation is concerned.

6. **Constitutional Law §320.10*—criminal prosecution—right to counsel—custodial interrogation on any offense.**

   Invocation of Fifth Amendment right to counsel during custodial interrogation precludes further questioning on any offense, not just one that was subject of interrogation.

7. **Constitutional Law §320.10*—criminal prosecution—right to counsel—uncharged offenses.**

   Invocation of Sixth Amendment right to counsel on one offense does not preclude further interrogation on other uncharged offenses.

8. **Constitutional Law §320.10*—criminal prosecution—right to counsel—initial appearance.**

   Since there is no Sixth Amendment right to counsel on uncharged offenses, invocation of right at initial appearance or arraignment on charged offense does not bring into play expanded scope of Fifth Amendment rule prohibiting further interrogation after invocation of right to counsel with respect to interrogation on uncharged offenses.

9. **Constitutional Law §320.10*—criminal prosecution—right to counsel—invocation of Fifth Amendment right by invocation of Sixth Amendment right.**

*See Callaghan's Wisconsin Digest, same topic and section number.

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Accused does not invoke his or her Fifth Amendment right to counsel by invoking Sixth Amendment right to counsel at initial appearance.

10. Constitutional Law §320.10*—criminal prosecution—right to counsel—custody requirement.

Fifth Amendment right to counsel attaches only when accused is in custody and subject to custodial interrogation.

11. Constitutional Law §320.10*—criminal prosecution—right to counsel—Fifth Amendment right at initial appearance.

Accused does not have Fifth Amendment right to counsel at initial appearance.

12. Constitutional Law §320.10*—criminal prosecution—right to counsel—meaning of request at initial appearance.

Ordinary meaning of accused's request for counsel at initial appearance is only that he or she is invoking Sixth Amendment right to counsel in pending prosecution.

13. Constitutional Law §320.15*—criminal prosecution—confession—suppression of statement.

Trial court properly determined that accused's lengthy detention before initial appearance did not amount to violation of due-process rights requiring suppression of statements given during period of detention, where accused promptly appeared before judicial court commissioner on Milwaukee county armed robbery charge for which he had been arrested and for which he was in custody, timely appearance rendered his subsequent detention in Milwaukee county jail lawful, and statements regarding his conduct in Racine county were given while he was in lawful custody in Milwaukee county, and since delay was not inordinate and detention was not illegal, due-process rights were not violated.

14. Criminal Law and Procedure §784*—review—findings of fact—bad-faith issue.

*See Callaghan's Wisconsin Digest, same topic and section number.

Trial court properly determined that accused's Sixth Amendment right to counsel had not been violated when prosecution formally filed on one charge, questioned on that charge and other possible charges, and subsequently charged on additional charges, where no showing of bad faith was made, trial court's findings were not clearly erroneous, and accused's involvement in several investigations did not by itself taint proper investigatory and interrogation procedures followed by police officers.

15. Constitutional Law §320*—criminal prosecution—right to silence—independent appellate review.

Determining whether right to silence has been scrupulously honored requires application of constitutional principles to facts of case and is subject to independent appellate review.

16. Constitutional Law §320*—criminal prosecution—right to silence—successive interrogations.

Trial court's finding that accused's right to silence was scrupulously honored in successive interrogations was proper, where accused initially invoked right to silence and interrogation was terminated, questioning was subsequently resumed after passage of significant period of time, defendant was given full and complete set of Miranda warnings prior to second and following interrogations, different officer resumed questioning at second interrogation, and second interrogation was limited to crime that was not subject of initial interrogation.

17. Criminal Law and Procedure §246*—withdrawal of guilty plea—ineffective assistance of counsel—review.

Trial court properly determined that accused was not entitled to withdraw guilty plea nor be granted new trial based on ineffective assistance of counsel, since accused's defense was not prejudiced by trial counsel's failure to expressly argue specific case which was not and is not precedent in state of Wisconsin, where case was argued at hearing held on motion to withdraw guilty plea, trial court decided that decision on

*See Callaghan's Wisconsin Digest, same topic and section number.

motion to suppress would have been same even if case had been argued at earlier trial proceeding, and thus ineffective assistance of counsel argument was made moot by trial court's hearing and decision on issue.

18. **Criminal Law and Procedure § 739*—confession—suppression of statement—prejudicial error.**

Trial court did not commit prejudicial error when it denied accused's motion to suppress statements made during interrogation, where accused entered no contest plea based on trial court's denial of suppression motion and subsequently argued that denial of motion violated constitutional rights and justified reversal of conviction and new trial, but reviewing court determined that all issues presented by accused on appeal were without merit, and because conclusion that trial court committed prejudicial error depended upon reviewing court's holdings, reviewing court could not find prejudicial error.

HEFFERNAN, C.J., ABRAHAMSON and BABLITCH, JJ., dissent.

APPEAL from an order of the circuit court of Racine county: EMMANUEL VUVUNAS, Judge. *Affirmed.*

For the defendant-appellant there was a brief (in the court of appeals) by *Gary M. Luck* and *Luck & Rosenthal*, Milwaukee and oral argument by *Gary M. Luck*.

For the plaintiff-respondent the cause was argued by *David J. Becker*, assistant attorney general, with whom on the brief (in the court of appeals) was *Donald J. Hanaway*, attorney general.

STEINMETZ, J. The issue certified is whether an accused's request for or appearance with counsel at an initial appearance on a charged offense constitutes an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated.

*See Callaghan's Wisconsin Digest, same topic and section number.

uncharged offenses. The trial court answered "no" and we agree.

Other issues in the case include whether the state illegally delayed filing the murder charges to conduct further investigation so as to obtain a sew-up confession. The trial court answered "no." We do not believe the issue presented is consistent with the facts.

Another issue before us is whether the defendant's statements should have been suppressed because they were obtained in violation of the defendant's fifth amendment right to be silent. The trial court answered "no" and we agree.

The final issue raised is whether the trial court should have allowed the defendant to withdraw his guilty plea and granted him a new trial. The trial court answered "no" and we agree.

The case is before this court by certification from the court of appeals granted pursuant to Rule 809.61, Stats. Paul McNeil, the defendant-appellant, seeks review of a judgment of conviction entered on March 18, 1988. Racine county circuit court Judge Emmanuel J. Vuvunas entered judgments of convictions against the defendant for the crimes of party to second-degree murder, party to attempted first-degree murder, and party to armed burglary. The sentence imposed by the judge was an indeterminate term of not more than 20 years for the party to second-degree murder conviction, 20 years for the party to attempted first-degree murder, and 20 years for party to armed burglary, all counts to be consecutive to one another for a total of 60 years.

This matter was initiated by a felony warrant request by Sergeant Robert Stauss of the town of Caledonia Police Department of the Racine county district attorney's office. The complaint was issued on May 27,

1987, by the then Racine county District Attorney Gerald Ptacek.

The warrant was served on the defendant who was being held in the Milwaukee county jail on an unrelated armed robbery charge and was brought before a Racine county magistrate on June 4, 1987. A preliminary examination was held on June 11, 1987, and subsequently various motions including motions to suppress the defendant's statements were filed. Judge Vuvunas denied the motions to suppress after five hearings were held.

A postjudgment notice of motion and motion to withdraw the guilty plea were presented. The motion requested a withdrawal of the defendant's guilty plea as a result of a manifest injustice because the court had ruled improperly when it ruled in favor of the state and against the claim of ineffective assistance of counsel. McNeil argued that defense counsel was incompetent during the course of the hearings on suppression of statements because counsel did not bring to the court's attention the most recent case law and supporting facts dealing with defendant's situation.

On hearings on the motion to withdraw the guilty plea, Judge Vuvunas ruled that trial counsel had not been ineffective and that he was now considering the case law and record which may not have been available earlier. He stated that even if he had been aware of the case law at the time he made his original decision, he would have ruled the same way and allowed the defendant's statements to be admitted into evidence.

The development of this case begins on May 21, 1987, when two Milwaukee county deputies escorted the defendant back to Milwaukee from Omaha, Nebraska. They had taken defendant into custody on a criminal complaint and warrant charging him with an armed robbery arising out of an incident in the city of West Allis in

Milwaukee county. The following day, May 22, 1987, the defendant was brought before court commissioner Frank J. Liska, Jr. in Milwaukee county. Bail was set and the matter was scheduled for a preliminary examination. The defendant had an attorney with him in court at that time.

Later in the day on May 22, and again on May 24 and May 26, still in the custody of the Milwaukee authorities, the defendant was interrogated regarding the episode that was to provide the basis for the criminal charges in this Racine county prosecution. Those charges were made by the filing of a criminal complaint on May 27, 1987. An initial appearance on those charges was held on June 4, 1987, in Racine county pursuant to a writ.

The critical question that must be answered in resolving the issue of the admissibility of the defendant's statements is whether an accused who has requested counsel at his initial appearance has thereby invoked not only his sixth amendment right to counsel, but his fifth amendment right to counsel as well.

The defendant appeared at his initial appearance in Milwaukee county for the unrelated offense of robbery. There he was represented by an attorney from the public defender's office. The record does not reveal whether he requested counsel at his initial appearance, only that he appeared with counsel at that appearance.

Defendant contends that since he appeared with counsel at the initial appearance on the unrelated Milwaukee county charge which triggered his sixth amendment right to counsel, he could not be subject to any further interrogation by the authorities about any offenses, including the Racine county offenses charged in this case, unless he initiated further communication, exchanges, or conversations with the police pursuant to

Edwards v. Arizona, 451 U.S. 477 (1981). Under the *Edwards* rule, when a suspect invokes his fifth amendment right to counsel during a custodial investigation, no further interrogation may be commenced by the authorities until counsel has been made available to him, unless he himself initiates further communication, exchanges, or conversations with the police. *Id.* at 484-85.

The defendant contends that his appearance with counsel at the initial hearing on the Milwaukee county charges constituted an invocation of his sixth amendment right to counsel that under the fifth amendment *Edwards* rule precluded the police from initiating any further interrogation of him, including questioning regarding the unrelated Racine county crimes. He argues that because it was the police that initiated the further interrogation that produced his statements regarding the Racine county crimes, those statements should have been suppressed under the *Edwards* rule.

[1, 2]

There are two distinct rights to counsel when a defendant is interrogated by the police. The first is the fifth amendment right to counsel recognized in *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). That right applies whenever a defendant is subjected to custodial interrogation irrespective of whether or not he has been formally charged with the offense to which the interrogation relates. *Id.* at 471. That right to counsel is not directly conferred by the fifth amendment, but rather is a prophylactic rule designed to safeguard the privilege against self-incrimination that is directly conferred by the fifth amendment. *See Solem v. Stumes*, 465 U.S. 638, 644 n.4 (1984).

[3-5]

The other right to counsel potentially applicable at an interrogation is the guarantee of the assistance of counsel in criminal proceedings directly conferred on a defendant by the sixth amendment.[1] That right to counsel attaches only "at or after the time that judicial proceedings have been initiated against [the accused]—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Such right is only applicable to interrogation that occurs subsequent to the initiation of formal judicial proceedings relating to the charge about which the interrogation is concerned.

Although it was initially recognized only in the fifth amendment context, the *Edwards* rule also applies to an invocation of the sixth amendment right to counsel. Thus, the *Edwards* rule also applies whenever an accused invokes his sixth amendment right to counsel, not just when he invokes it during the course of custodial interrogation. The invocation of right to counsel at an initial appearance will therefore trigger the *Edwards* rule. *See Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

[1]The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[6]

While the *Edwards* rule applies to both the fifth and sixth amendment rights to counsel, the scope of its application differs depending on which of the two rights is being invoked. In the fifth amendment context, an invocation of the right during custodial interrogation precludes further questioning on any offense, not just the one that was the subject of the interrogation. *Arizona v. Roberson*, 486 U.S. 675, 685 (1988) (distinguishing the sixth amendment right to counsel from the fifth amendment prophylactic right to counsel to protect against self-incrimination).

[7, 8]

In contrast, an invocation of the sixth amendment right to counsel on one offense does not trigger the *Edwards* rule with respect to interrogation on other offenses, at least not those that have not been charged. As to the uncharged offenses, an accused has no sixth amendment right to counsel, so interrogation on those uncharged offenses cannot be deemed "in derrogation of [the] Sixth Amendment right invoked [by the accused] at his arraignment" on a charged offense. *People v. Buckles*, 155 Mich. App. 1, 399 N.W.2d 421, 423 (1986). Since there is no sixth amendment right to counsel on uncharged offenses, an invocation of that right at an initial appearance or arraignment on a charged offense does not bring the expanded scope of the fifth amendment *Edwards* rule into play with respect to interrogation on uncharged offenses. *See Moran v. Burbine*, 475 U.S. 412, 431 (1986); *Maine v. Molton*, 474 U.S. 159, 180 n.16 (1985).

The defendant cites a case from the Seventh Circuit Court of Appeals as indistinguishable. *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 123 (7th Cir. 1987), expressly held: "that individuals who invoke their

right to counsel at their arraignment are invoking both their Sixth Amendment and their Fifth Amendment rights." This court is not bound by the *Espinoza* holding as precedential value. *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983).

Likewise, the United States Supreme Court has recently ruled on *Butler v. McKeilar*, — U.S. — (March 5, 1990). The facts in *Butler* indicate that, unlike McNeil, the defendant invoked his fifth amendment right to counsel upon arrest on an unrelated assault and battery charge. The defendant then retained counsel who appeared with him at a bond hearing on the unrelated charge on August 31, 1980. The defendant was subsequently informed that he was a suspect in a murder. He was read his *Miranda* rights, stated he understood his rights and signed two waiver forms. The defendant was interrogated concerning the murder and confessed. At no time did he request counsel during this interrogation. The defendant was charged with the murder and convicted.

The issue before the United States Supreme Court in *Butler* concerns the retroactivity on collateral attack of *Roberson*. The *Butler* Court held that *Roberson* was not retroactive on collateral attack, and it affirmed Butler's conviction.

Although proponents of *Espinoza* and cases following the holding in *Espinoza* might interpret *Butler* as changing *Roberson* to affect an outcome on the certified issue now before us that is on all fours with *Espinoza*, we disagree. We continue to interpret *Roberson* to apply only to the invoked fifth amendment prophylactic protection of "having an attorney present to counteract the inherent pressures of custodial interrogation . . .." *Roberson*, 486 U.S. at 685.

[9]

We do not read *Butler* and *Roberson* as affecting a transmutation of the sixth amendment right to counsel into a fifth amendment right to counsel. We hold that a defendant does not invoke his or her fifth amendment right to counsel by invoking the sixth amendment right to counsel at an initial appearance.

[10, 11]

The fifth amendment right to counsel recognized in *Miranda* is not one that attends a criminal suspect under all circumstances and in every situation. Rather, it attaches only when an accused is in custody, *United States v. Henry*, 447 U.S. 264, 273 n. 11 (1980), and subject to custodial interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 198 (1980). An accused may well be in custody at an initial appearance, but he is not being subjected to interrogation. Thus, there is no fifth amendment right to counsel at an initial appearance. When an accused invokes his sixth amendment right to counsel at that appearance, there is no basis for concluding that he is invoking his fifth amendment right to counsel.

Connecticut v. Barrett, 479 U.S. 523, 528 (1987), which discusses the fifth amendment right to counsel, instructs that one should examine the issue by "reference to [the] prophylactic purpose" of *Miranda* and, therefore, of the *Edwards* rule. By doing this, one reaches the conclusion that a sixth amendment request for counsel at an initial appearance should not be deemed an invocation of the fifth amendment right to counsel that would trigger the *Edwards* rule. The *Edwards* rule is "designed to insulate the exercise of Fifth Amendment rights from the government 'compulsion, subtle or otherwise,' that 'operates on the individual to overcome free choice in producing a statement

after the privilege has been once invoked.' " *Barrett*, 479 U.S. at 528.

There might well be legitimate concern that a reinitiation of interrogation after a request for counsel at an interrogation session or in response to *Miranda* warnings would constitute "subtle compulsion" because it might lead a defendant to question whether the police really intend to honor his right to counsel. However, when an accused has not requested counsel in the context of custodial interrogation or in response to *Miranda* warnings pursuant to the fifth amendment, but rather invokes his sixth amendment right at his initial appearance on a criminal charge, it is difficult to see what "subtle compulsion" would exist if the police were to approach the defendant and seek to interrogate him on an unrelated crime after providing a full warning of his *Miranda* rights, including the right to counsel.

The defendant relies on language in *Jackson*, 475 U.S. at 633-34 n.7, for his position that a request for counsel at an initial appearance invokes the fifth amendment right to counsel. The proffered language from *Jackson* states:

> 'Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has

> requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.'

Defendant's reliance is misplaced. In that passage, the Supreme Court is quoting a passage from the Michigan Supreme Court's decision in *People v. Bladel*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984). However, the Michigan Supreme Court in its decision expressly held that a defendant who requests counsel at an arraignment only invokes the sixth amendment right to counsel and does not thereby invoke his fifth amendment right to counsel. *Bladel*, 421 Mich. at 52-53, 365 N.W.2d at 62; *see also Jackson*, 475 U.S. at 630 n.4 (noting that the Michigan court did not rely on the fifth amendment and expressly refusing to comment on the Michigan court's fifth amendment analysis).

The language in *Jackson*, which requires a broad interpretation to be accorded a defendant's invocation of his sixth amendment right to counsel, does not mean that the court must transmute the invocation of that right into an invocation of another right, the fifth amendment right to counsel. Rather, in context, the *Jackson* decision used the quoted passage from *Bladel* in an attempt to assess how broadly to interpret the defendant's invocation of only his sixth amendment right to counsel. The *Jackson* court refused to accept the state's argument that the defendant's sixth amendment request for counsel in *Bladel* was a limited invocation applying only to representation in formal legal proceedings. Instead, the Court stated that "the settled approach to questions of waiver" required a broad interpretation be placed on the defendant's request. *Jackson*, 475 U.S. at 633.[2] The breadth of one's invocation of the sixth

[2]The facts in *Bladel* are distinguishable from those in the

amendment right to counsel is clearly not at issue in the case now before us. At issue is whether invocation of the sixth amendment right to counsel automatically transforms into an invocation of the fifth amendment right to counsel.

In *Barrett*, 479 U.S. at 529, the Supreme Court analyzed the defendant's unambiguous invocation of his fifth amendment right to counsel at a custodial interrogation and the scope of his invocation and gave it the broadest possible interpretation on consideration of waiver. The *Barrett* Court concluded that a fifth amendment request for counsel at a custodial interrogation before defendant would give police a written statement did not prohibit the police from obtaining and using at trial oral statements volunteered by the defendant. The court rejected the defendant's argument that "broad effect" must be given "to requests for counsel that [are] less than all-inclusive." The Supreme Court stated:

> Barrett made clear his intentions [he was willing to give an oral statement, but not a written statement in the absence of counsel] and they were honored by police. To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

479 U.S. at 529-30. (Footnote omitted.)

[12]

The "ordinary meaning" of a defendant's request for counsel at an initial appearance is only that he is invoking his sixth amendment right to counsel in the pending

case now before us in that at all times *Bladel* concerned only three counts of first-degree premeditated murder upon which Bladel was arraigned.

prosecution. When a defendant invokes his sixth amendment right to counsel in a pending prosecution by requesting or accepting counsel at the initial appearance, it need not be viewed as an invocation of the fifth amendment right precluding interrogation on unrelated crimes any more than the limited invocation of the fifth amendment right to counsel in *Barrett* needed to be viewed as an invocation of the full fifth amendment right.

Other jurisdictions agree with our holding which rejects the *Espinoza* rationale and keeps the prophylactic protections provided under the fifth amendment right to counsel separate from the sixth amendment right to counsel. The Michigan Supreme Court in *People v. Crusoe*, 433 Mich. 666, — N.W.2d —, 1989 Mich. LEXIS 2823, 27 [*31] (Dec. 8, 1989), refused to extend the *Roberson* rationale beyond its express fifth amendment application to include extension of the sixth amendment invocation of right to counsel to shield the defendant from postarraignment interrogations on unrelated charges. In so holding, the *Crusoe* court expressly rejected and reversed the court of appeals decision which adopted the analysis of *Espinoza*: "We find no authority for the adoption of a rule that a defendant's request for court appointed counsel at an arraignment invalidates a waiver of a defendant's right to counsel per se under *Miranda* during a subsequent police-initiated interrogation concerning a different and unrelated offense." (Footnote omitted.) (Citing *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989)).

The Second District Court of Appeals in *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989), asserted that the situation before it was "quite different from [that] of *Edwards*, *Jackson* and *Roberson*." That court said: "Roberts would have us hold that, once an

accused's Sixth Amendment right to counsel attaches, his Fifth Amendment rights become unwaivable in the context of a separate investigation. Such a conclusion comports with neither the letter nor the spirit of *Edwards* and its progeny." *Id.*

The court in *State v. Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 853 (1989) offered an identical conclusion:

> In the end, we hold Stewart's Sixth Amendment right to counsel did not attach on these burglary charges until months after his confessions. He did not invoke his Fifth Amendment right to counsel when he requested an attorney at an arraignment on an unrelated charge. The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during in-custody interrogation, which was not occurring at the time Stewart requested counsel. Subsequently, prior to giving his confession, Stewart was given *Miranda* warnings and did not invoke his Fifth Amendment right at that time. There has been no showing of confusion on the part of the defendant, nor trickery on the part of the State. Extension of the *Edwards* rule to this fact scenario would constitute a misapplication of that prophylactic rule.

[13]

The defendant next complains that there was an unreasonably long detention before his initial appearance on the Racine county charges that requires suppression under the rule in *Phillips v. State*, 29 Wis. 2d 521, 534, 139 N.W.2d 41 (1966). Regarding the nature of the *Phillips* rule and what is ultimately at issue when a *Phillips* claim is raised, this court has stated:

> The suppression of sew-up confessions is based on the rule that a defendant who has not yet been charged may be taken into custody and interrogated

only for a period reasonably necessary for the State to decide whether to release him or to make a formal complaint. A detention for any longer period violates due process and renders any confession obtained during the unreasonable period inadmissible. *Briggs v. State*, 76 Wis. 2d 313, 323, 251 N.W.2d 12 (1977); *Klonowski v. State*, 68 Wis. 2d 604, 229 N.W.2d 637 (1975); *Phillips v. State*, 29 Wis. 2d 521, 534-5, 139 N.W.2d 41 (1966). However, 'A confession does not become inadmissible as a "sew-up" confession merely because the state, prior to the confession, had information sufficient to sustain a charge. The question revolves solely on the point whether the delay was inordinate and the detention illegal.' *Briggs v. State*, *supra* at 324; Krueger v. State, 53 Wis. 2d 345, 357, 192 N.W.2d 880 (1972).

State v. Benoit, 83 Wis. 2d 389, 404-05, 265 N.W.2d 298 (1978).

We hold that the facts of this case are not consistent with a conclusion that the *Phillips* rule was violated. McNeil promptly appeared before a judicial court commissioner on the Milwaukee county armed robbery charge for which he had been arrested and for which he was in custody. The timely appearance rendered his subsequent detention in the Milwaukee county jail lawful. The statements regarding his conduct in Racine county were given while he was in lawful custody in Milwaukee county.

The defendant's argument on this issue then seems to switch from the due process concerns of the *Phillips* rule to an examination of a possible sixth amendment violation under *State v. Lale*, 141 Wis. 2d 480, 415 N.W.2d 847 (Ct. App. 1987). Here, McNeil suggests that the state deliberately delayed filing the Caledonia murder charges as a pretext to allow further investigation of these unfiled charges without fear of violating his sixth

amendment right to counsel. This is a direct reference to principles discussed in *Lale* wherein the court of appeals adopted as law combined interpretations of *Moulton*, 474 U.S. 159, and *Burbine*, 475 U.S. 412, which state that a defendant's sixth amendment right to counsel is not involved when the police obtain incriminating statements on unfiled charges that are unrelated to a filed charge.

The court of appeals in *Lale* noted the existence of a possible exception to this rule which the defendant argues is applicable here. The exception states that a possible violation of the sixth amendment may occur when "the government formally files on some charges but delays filing of another charge as a pretext to facilitate investigation of that unfiled charge without being hampered by the sixth amendment . . .." *Lale*, 141 Wis. 2d at 489. The court of appeals suggested that under such circumstances "bad faith may exist." *Id.*

Here, on December 14, 1987, at the defendant's hearing on the motion to suppress the confession, the trial court on the facts presented expressly refused to find any bad faith in how the authorities handled this case. The court specifically stated:

> I don t think there has been any showing that there was conduct in bad faith being done here. I think the officers who were going through this in a case which involves a defendant who was involved in lots of different problems. Involved in several different investigations. Certainly from the testimony that's come through here. I don't think there's been any showing like that at all.

[14]

The trial court's findings of fact on the bad faith issue will not be overturned unless clearly erroneous. *State v. Owens*, 148 Wis. 2d 922, 929, 436 N.W.2d 869

(1989). Here, the defendant has offered no showing to support a determination that the trial court's findings were clearly erroneous. Thus, the trial court's refusal to find bad faith removes this case from the *Lale* exception, and we agree with the trial court that McNeil's sixth amendment right to counsel under the *Lale* theory has not been violated.

[15]

The defendant next claims his statements should have been suppressed because the police did not "scrupulously honor" his request to remain silent as they are required to do under the United States Supreme Court's decision in *Michigan v. Mosley*, 422 U.S. 96 (1975). Determining whether the right to silence has been scrupulously honored requires the application of constitutional principles to the facts of the case and is subject to independent appellate review.

There are five factors that are to be considered in deciding whether an invocation of the right to silence has been "scrupulously honored." Those factors as adopted from *Mosley*, 423 U.S. at 104–05 and as enumerated in *State v. Hartwig*, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985), are:

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time . . . . (3) The suspect was given complete *Miranda* warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

The factors are not to be woodenly applied. *Id.* at 284-85. They provide a framework of analysis to aid in determining the essential issue of whether the defendant's right to silence was scrupulously honored. *Id.*

[16]

All five factors are satisfied in this case. The defendant initially invoked his right to silence and the interrogation was terminated. The questioning was resumed after the passage of a significant period of time, either one or two days depending on the version accepted, the defendant's or the police. *Cf. State v. Turner*, 136 Wis. 2d 333, 357, 401 N.W.2d 827 (1987) (periods of 20 and 24 hours have been deemed significant time spans for *Mosley* purposes).

Prior to the second and subsequent interrogations, the defendant was given a full and complete set of *Miranda* warnings.[3] The officers conducting those interrogations made sure the defendant understood each of the rights about which the warnings advised the defendant and secured an express waiver of them.

A different officer, Officer Butts, resumed the questioning at the second interrogation. The defendant's initial invocations of his right to silence were made when Detective Smukowski attempted to interrogate him. The subsequent interrogations were conducted by different officers. The second and subsequent interrogations were restricted to a crime that had not been the subject of the initial interrogation.

Prior to his arrest and return to Milwaukee, the defendant's girlfriend had told Officer Butts who initiated the second interrogation after the defendant invoked his right to silence that he (the defendant) "wanted to talk to [the officer] when he got back to Milwaukee." With this indication of a desire to talk to the interrogating officer, it does not appear that McNeil's previously invoked right to silence was not

[3]The advice given by the dissent was fulfilled by the officers in this case and served as part of the basis for the majority opinion.

scrupulously honored when that officer approached him and, after giving *Miranda* warnings, determined that the defendant was willing to talk to him about his part in the Racine county town of Caledonia crimes.

The defendant immediately raised to the police the subject of the Caledonia incident that provided the basis for the charges in this case. Notwithstanding his initial invocation of his right to silence regarding the West Allis case when he was interrogated in Omaha, the defendant affirmatively wanted to speak to the police about the Caledonia crime at issue in this case. Under the circumstances, there is no basis for finding that his right to silence was not scrupulously honored.

[17]

The defendant also argues that he should be allowed to withdraw his guilty plea and should be granted a new trial. He bases his request on the theory of ineffective assistance of counsel. The ineffective assistance of counsel argument, which was raised in McNeil's notice of motion and motion to withdraw the guilty plea, was based on trial counsel's failure to originally brief and argue the *Espinoza* case on pretrial motions to suppress evidence.

A hearing was held on the motion to withdraw the guilty plea at which the *Espinoza* case was argued. Exhibits were also accepted into evidence which established that the defendant had been before a Milwaukee county magistrate in the morning hours of May 22, 1987, on the Milwaukee robbery charges and that he was represented by a state public defender at that time. In relevant part, the trial court's decision on the motion stated:

> The Court having heard testimony and having read the law presented by the parties makes the following Findings of Fact:

> That defense counsel's performance was deficient . . ..
>
> The Court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied.

In briefs reviewed by this court, McNeil states that his ineffective assistance of counsel argument is made moot by the trial court's hearing and decision on the issue. We agree. The argument was made on reliance of case law that was not and is not precedent in the state of Wisconsin. McNeil's defense was therefore not prejudiced by trial counsel's failure to expressly argue *Espinoza*.

[18]

McNeil then apparently changes his argument on brief on this issue to assert that the defendant's sole basis for entering a no contest plea was the trial court's denial of his suppression motion. He argues that the denial of his motion violated his constitutional rights and therefore justifies reversal of his conviction and a new trial. This amounts to an argument that the trial court committed prejudicial error by denying the motion. Because we hold against McNeil on all of the issues presented in this case and because a conclusion that the trial court committed prejudicial error depends upon our holdings here, we hold that the trial court did not commit prejudicial error when it denied the suppression motion.

By the Court.—The order of the Racine county circuit court is affirmed.

CHIEF JUSTICE HEFFERNAN (dissenting). The majority concludes that an accused who requests counsel at an initial appearance and remains in continuous custody has not invoked the fifth amendment right to counsel which precludes police-initiated interrogation on unrelated, uncharged offenses. I disagree.

The majority states that the issue is whether invocation of the sixth amendment right to counsel automatically transforms into an invocation of the fifth amendment right to counsel. (Majority op. at p. —.) The fifth amendment protection against self-incrimination provides the right to counsel at custodial interrogations, irrespective of whether a defendant has been formally charged or not. *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Arizona v. Roberson*, 486 U.S. 675 (1988). Hence, the issue in this case is whether the defendant invoked his fifth amendment right to counsel when he requested assistance of counsel at an initial appearance instead of while being interrogated afterwards.

I am persuaded that the reasoning of the Seventh Circuit Court of Appeals in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied, Fairman v. Espinoza*, 483 U.S. 1010 (1987), is correct and should be followed by this court. *Espinoza* holds that, when a defendant requests[1] an attorney at an initial appearance and remains in custody, the court should presume that the defendant has invoked his fifth amendment right to counsel and police-initiated interro-

[1]In *Espinoza*, the defendant accepted the appointment of counsel, but did not specifically request counsel. The *Espinoza* court concluded that the defendant's unqualified acceptance of counsel at his arraignment was equivalent to a request for counsel and that it was not necessary for the defendant to specifically request counsel in order to invoke this right. 813 F.2d at 123.

gation is thereafter prohibited on any crime. *See Edwards v. Arizona*, 451 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988).

The majority rejects the Seventh Circuit's approach by distinguishing between a defendant who makes a request for assistance of counsel to a police officer while subject to a custodial interrogation and a defendant who makes a request for assistance of counsel to a magistrate and thereafter remains in continuous custody. The majority asserts that, while a defendant is in custody at an initial appearance, he is not being interrogated. Because the defendant is not being interrogated when he makes his request for an attorney, the majority leaps to the conclusion that there is no danger of compelled testimony and, therefore, the fifth amendment right to counsel which arises from the protection against self-incrimination is not implicated. The majority misreads the holdings of *Miranda v. Arizona*, *supra*, and *Edwards v. Arizona*, *supra*.

Miranda established that the fifth and fourteenth amendments require that, prior to any custodial interrogation, defendants be informed of their right to remain silent and their right to have counsel present "during custodial interrogation." *See Edwards*, 451 U.S. at 481-482. This does not mean that the *request* for counsel must be made "during custodial interrogation." In *Edwards v. Arizona*, the Supreme Court established a bright-line rule that, if a defendant requests counsel while in custody, police-initiated interrogation must cease until an attorney is present. *Edwards* added protection to prevent police from badgering a defendant into waiving previously asserted *Miranda* rights. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). Nowhere does *Edwards* or any of its progeny indicate accuseds must assert their *Miranda* right to counsel while they are

being interrogated. The request must be made while the defendant is in custody, prior to, or during, an interrogation.

It is apparent that there is danger of "subtle compulsion" when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependent upon the subject matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated.

Finally, I disagree with the majority that recent United States Supreme Court decisions provide support for its position. To the contrary, recent Supreme Court decisions support the Seventh Circuit Court of Appeals' decision in *Espinoza*. First, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court resolved a conflict among the circuits and state courts, accepting the position taken by the Seventh Circuit in *Espinoza*, 486 U.S. at 679, n.3. The *Roberson* court held that, when a suspect requests counsel, the fifth amendment bars police-initiated interrogation on any crime, even one which was not the subject of the original interrogation. Recently, in *Butler v. McKellar*, — U.S. — (March 5, 1990) (formerly reported as *Butler v. Aiken*), the Supreme Court held that *Roberson* could not be applied retroactively in cases on collateral review and, for that reason, the particular defendant could not reap the benefit of the rationale of the *Espinoza* court. The issue raised before the Court of Appeals

in *Butler* was whether *Espinoza* required the police, during continuous custody, to refrain from all further questioning on any offense once an accused invokes his right to counsel. In resolving this issue, the Fourth Circuit Court of Appeals rejected the Seventh Circuit's holding in *Espinoza*. *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988). After the Supreme Court issued its decision in *Roberson*, the Fourth Circuit Court of Appeals, on defendant's petition for rehearing, acknowledged that its decision, rejecting the *Espinoza* rationale, was doubtful but that the defendant was not entitled to the retroactive benefit of *Roberson*. 864 F.2d 24, 25 (4th Cir. 1988), *reh'g denied*. The Supreme Court agreed that Butler was not entitled to a retroactive application of *Roberson*. The court noted the discrepancy between the Seventh Circuit and the Fourth Circuit as evidence that the outcome in *Roberson* was not clear from the earlier holding in *Edwards* and therefore constituted a "new rule," hence, not calling for retroactive application. While the Supreme Court limited its holding to the retroactive application of *Roberson*, its approval of *Espinoza* is significant. I conclude that the *Espinoza* court's analysis of the fifth amendment right to counsel is correct and implicitly has been approved by the United States Supreme Court. Therefore, law enforcement officers may be well advised to comply with *Miranda-Edwards* standards whenever a suspect is interrogated under the circumstances here.[2] Reliance on the majority's view of

[2]I would like to clarify that our advice was not followed by these officers and does not serve as part of the majority's opinion. The majority misinterprets *Miranda* and its progeny. It is true that the officers in this case gave *Miranda* warnings to the defendant before they interrogated him and after he invoked his fifth amendment right to counsel by requesting an attorney at his initial appearance. *Miranda*, however, stands for more than the

what constitutes a constitutionally antiseptic confession may result in the suppression of crucial evidence. It would appear to this writer to be prudent to follow *Espinoza* by assuming that defendants who request assistance of counsel at an initial appearance and remain in custody have thereby invoked their fifth amendment right to counsel, and police-initiated interrogation is thereafter prohibited in respect to any crime unless the suspect waives his right to counsel.

I respectfully dissent and would reverse the trial court's judgment of conviction.

I am authorized to state that Justice Shirley S. Abrahamson and Justice William A. Bablitch join in this dissent.

---

prophylactic rule that requires law enforcement officers to inform defendants of their right to counsel. *Miranda* recognized the already existing fifth amendment right to have counsel present at custodial interrogations. The fifth amendment right to counsel, as interpreted in *Edwards*, requires that police-initiated interrogation cease with respect to any crime once the defendant has invoked that right. Accordingly, it was not enough for the police officers in this case to read the defendant his *Miranda* rights again. The fifth amendment requires that police-initiated interrogation must cease.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH IV | RACINE COUNTY

STATE OF WISCONSIN,
Plaintiff,

-vs-

PAUL McNEIL,
Defendant.

DECISION

87CF337

Motion was brought before the Court for a new trial based on ineffective assistance of counsel. The defendant bases his claim because during a motion to suppress statements taken from the defendant, the Court was not presented with the proper record, nor was the case of U.S. Ex rel Espinoza vs. Fairman, 813 F. 2d, 117 (7th Cir. 1987) argued to the Court, which would have enabled it to make a proper decision suppressing all statements of the defendant.

To prevail on this motion, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.

The case which is cited by the defense is a case decided by the Seventh Circuit Court of Appeals, and it had been decided several months prior to the date of the motion brought before the Court. It is uncontroverted that there are no Wisconsin cases that have decided this issue in the same manner as the Seventh Circuit Court has.

There is also case law to the effect that the state courts are not bound by all decisions of the federal courts, and that the Seventh Circuit case may not be precedential.

The Court having heard testimony and having read the law presented by the parties makes the following Findings of Fact:

That defense counsel's performance was not deficient.

That the record as a whole, and the Court has gone over the whole record, shows that counsel argued at length the motions to suppress and submitted briefs to that effect and represented the defendant in a way which was more than just able and competent.

That the nonarguing of this federal case before the trial court was not a deficient performance which would have prejudiced the defense.

The Court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied.

Dated February 28, 1989.

BY THE COURT:

Hon. Emmanuel J. Vuvunas
Branch IV

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL McNEIL,

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rules 12.1, 29.3, 29.5, 21.3, Rules of the Supreme Court of the United States, I hereby certify that counsel for respondent listed below and necessary to the proceedings herein have been serviced by depositing at a United States Post Office, with first-class postage prepaid, on July 27, 1990, copies of the following:

1) Petition for Writ of Certiorari to the Wisconsin Supreme Court;
2) Motion for Leave to Proceed In Forma Pauperis;
3) Affidavit of Petitioner in Support of Motion for Leave to Proceed In Forma Pauperis;
4) Certificate of Service

Donald Hanaway
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DATED this 27th day of July, 1990.

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Waukesha, Wisconsin 53188

PLEASE REPLY TO

July 27, 1990

Milwaukee

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Joseph F. Spaniol, Jr.
Clerk
Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington, DC 20543

RE: Paul McNeil, Petitioner v. State of Wisconsin, Respondent

Dear Sir:

Enclosed please find the following:

1) An original and one copy of a Writ of Certiorari in the above matter;
2) An original and one copy of a Motion In Forma Pauperis;
3) An original and one copy of an Affidavit to Proceed In Forma Pauperis;
4) An original and one copy of a Certificate of Service.

I would appreciate the return of one of the copies date stamped as to time received in the enclosed self-addressed, stamped envelope.

Very truly yours,

LUCK & ROSENTHAL, S.C.

Gary M. Luck
Attorney of Record
Attorney for Petitioner

GML/kp

cc: client

Supreme Court U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL McNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN RESPONSE TO PETITION

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Attorney General of Wisconsin

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No. 90-5319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL McNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN RESPONSE TO PETITION

SUMMARY OF ARGUMENT

The respondent, the State of Wisconsin, does not oppose the petition for certiorari filed in this case. The issue presented by the petition is whether a defendant who has invoked his sixth amendment right to counsel on one charge by appearing with counsel at an initial appearance on that charge may be subjected to police-initiated interrogation about other unrelated offenses while he is being held in continuous custody on the charged offense. In the decision of which certiorari review is sought, the Wisconsin Supreme Court held that such interrogation is permissible. In an earlier decision, expressly rejected by the Wisconsin Supreme Court in its decision in this case, the Seventh Circuit Court of Appeals

held that it is not. Review by this Court is necessary to resolve the conflict between the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals and to provide definitive guidance to Wisconsin law enforcement officers and prosecutors, who need to know whether defendants who have invoked their sixth amendment right to counsel on one offense by appearing with counsel at a court proceeding relating to that offense may be interrogated about other unrelated offenses while they are being held in continuous custody.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI FILED IN THIS CASE SHOULD BE GRANTED SO THIS COURT CAN RESOLVE THE CONFLICT BETWEEN THE WISCONSIN SUPREME COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS ON THE ISSUE PRESENTED.

Paul McNeil, the petitioner herein, has filed a petition for a writ of certiorari seeking this Court's review of the decision of the Wisconsin Supreme Court in his case: State v. McNeil, 155 Wis. 2d 24, 454 N.W.2d 742 (1990). The respondent, the State of Wisconsin, does not oppose the petition.

The issue presented by the petition is whether a defendant who has invoked his sixth amendment right to counsel on one charge by appearing with counsel at an initial appearance on that charge may be subjected to police-initiated interrogation about other unrelated offenses while he is being held in continuous custody on the charged offense. In its decision in this case, the Wisconsin Supreme Court held that such interrogation is permissible. In an earlier decision, expressly rejected by the Wisconsin Supreme Court

in its decision in this case, the Seventh Circuit Court of Appeals held that it is not. See United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir.), cert. denied, 107 S. Ct. 3240 (1987).

This case thus falls squarely within the criterion guiding this Court's exercise of certiorari jurisdiction that is found in Sup. Ct. R. 10.1(b):

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

But the State of Wisconsin's decision not to oppose the petition for certiorari is not based on this case's abstract satisfaction of one of the legal criteria this Court has established to guide its exercise of certiorari jurisdiction. Rather, it is grounded on the very real practical consequences to effective law enforcement in Wisconsin that flow from the conflict this case creates between the State of Wisconsin's highest court and the Seventh Circuit Court of Appeals, whose decisions bind the federal courts in Wisconsin.

Under the conflicting decisions of the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals, Wisconsin law enforcement officers have been placed in an extremely difficult position when they are called upon to decide whether to interrogate a criminal defendant who has invoked his sixth amendment right to counsel with respect to a charged offense by appearing with counsel at judicial proceedings relating to that offense. While the law is clear that no interrogation is permitted with respect to the charged offense, see Michigan v. Jackson, 475 U.S. 625 (1986), law enforcement

officers have been given diametrically opposed direction as to the propriety of interrogation about unrelated offenses. The Wisconsin Supreme Court has said such interrogation is permissible. The Seventh Circuit Court of Appeals has said it is not.

What is a Wisconsin law enforcement officer to do? If he follows the direction of the Wisconsin Supreme Court, he may succeed in eliciting admissions from the defendant that are critical to a successful prosecution of the crime he is investigating. A prosecution and conviction based on those admissions will survive challenge in the Wisconsin state courts under the Wisconsin Supreme Court's decision in this case. But the federal district court will, as a matter of course, grant habeas corpus relief to the defendant on the basis that the interrogation producing the critical admissions was obtained in violation of the Seventh Circuit's decision in Espinoza.

If, on the other hand, the officer follows the counsel of the Seventh Circuit Court of Appeals and declines to interrogate the defendant, he loses the only opportunity he may have to obtain the evidence he needs for a successful prosecution for the crime he is investigating. And, assuming the Wisconsin Supreme Court's decision in this case is correct, the opportunity will have been lost gratuitously; no constitutional mandate would have required the officer to forgo it.

The present state of the law thus presents Wisconsin law enforcement officers with a true dilemma when confronted with the situation with which this case and Espinoza deal. They can engage in the interrogation necessary to solve the crime they are

investigating and to convict the defendant of it, which Wisconsin's highest court has told them is constitutionally permissible, only to find the defendant's conviction set aside by the federal district court. Or they can forgo that interrogation with the concomitant risk that no successful prosecution of the person responsible for the crime they are investigating will be possible.

Wisconsin prosecutors face a similar dilemma when police officers have interrogated a charged defendant about an unrelated offense after he has invoked his right to counsel on the charged offense. At the trial of the unrelated offense, does the prosecutor use the incriminating statements produced by the interrogation, which the Wisconsin Supreme Court has said is constitutionally permissible, knowing that any conviction he obtains will be set aside by the federal district court under Espinoza? Or does he forgo use of the incriminating statements, and thus avoid the possibility of having the conviction set aside by the federal district court? If he chooses the latter course, he runs the risk of not obtaining a conviction at all because what may be the most compelling evidence of the defendant's guilt is not presented to the jury. That is a risk which he should not have to consider running, and to which the people of the State of Wisconsin should not be subjected, if the Wisconsin Supreme Court's decision in this case is correct.

There is only one way to resolve the dilemma facing Wisconsin law enforcement officers and prosecutors. That is for this Court to decide which decision is correct--the Wisconsin Supreme Court's in this case, or the Seventh Circuit Court of Appeals' in Espinoza.

For that reason, the State of Wisconsin does not oppose the petition for certiorari filed in this case. It should be granted to resolve the intolerable conflict that presently exists between the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals on the issue presented.

CONCLUSION

For the reasons stated, the State of Wisconsin requests this Court to grant the petition for writ of certiorari filed in this case.

Respectfully submitted,

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August 16, 1990

Mr. Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Paul McNeil v. State of Wisconsin, No. 90-5319

Dear Mr. Spaniol:

Enclosed for filing in the above action please find twelve copies of the Brief in Response to Petition for Writ of Certiorari. Also enclosed is an affidavit of service.

Sincerely,

David J Becker

David J. Becker
Attorney for Respondent

DJB:jmw

Enclosures

cc: Gary M. Luck
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No. 90-5319

IN THE
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October Term, 1990

PAUL McNEIL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

JUDITH MARIE WADDELL, being first duly sworn, on oath deposes and says that on the 16th day of August, 1990, she served the Brief in Response to Petition for Writ of Certiorari to the Supreme Court of Wisconsin upon Gary M. Luck, Attorney at Law, attorney for petitioner, by depositing one copy of the same in a United States mail box, with first class postage prepaid, to him at the following address:

839 North Jefferson Street
P.O. Box 93726
Milwaukee, Wisconsin 53202

Judith Marie Waddell
JUDITH MARIE WADDELL

Subscribed and sworn to before me
this 16th day of August, 1990.

Denise J. Scheeling
Notary Public, State of Wisconsin
My Commission: expires 10/24/93

Supreme Court, U.S.
FILED
DEC 6 1990
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No. 90-5319

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PAUL MCNEIL,
Petitioner,

v.

WISCONSIN,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 30, 1990
CERTIORARI GRANTED OCTOBER 29, 1990

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Certification from Court of Appeals of Wisconsin, District II dated November 1, 1989	16
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Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, October 29, 1990	46

CHRONOLOGY OF RELEVANT EVENTS AND DOCKET ENTRIES

DATE	PROCEEDINGS
May 18, 1987	Town of Caledonia Police Department prepares a request for a warrant to charge the Petitioner with various offenses including party to a crime first degree murder
May 20, 1987	Petitioner is taken into custody by Milwaukee County Deputy Sheriffs to be returned to Milwaukee, Wisconsin for charges of armed and masked robbery
May 22, 1987	Petitioner appears before a Milwaukee County Judicial Court Commissioner for an initial appearance with an appointed attorney on the charges of armed and masked robbery; bail is set and the matters are scheduled for a preliminary hearing
May 22, 1987	After his initial appearance in court, while in custody, Petitioner is questioned regarding the Town of Caledonia murder and a statement is obtained
May 24, 1987	While in custody, Petitioner is questioned regarding the Town of Caledonia murder and a statement is obtained
May 26, 1987	While in custody, Petitioner is questioned regarding the Town of Caledonia murder and a statement is obtained
May 27, 1987	The Town of Caledonia request for warrant dated May 18, 1987, is received by the Racine County District Attorney and a complaint and warrant charging Petitioner with party to a crime first degree murder and other offenses is issued

DATE	PROCEEDINGS
June 4, 1987	Petitioner makes his first appearance in Racine County, Wisconsin, on criminal charges including party to a crime first degree murder; bond is set and a preliminary hearing is scheduled
July 9, 1987	Motions are filed including motions to suppress Petitioner's statements
December 14, 1987	Petitioner's motion to suppress statements is denied
January 19, 1988	Petitioner enters plea of guilty to amended charge of second-degree murder, attempted first degree murder, and armed burglary, all as party to a crime
March 18, 1988	Petitioner sentenced to imprisonment for a total of 60 years
February 15, 1989	Hearing on Petitioner's motion to withdraw guilty plea
February 28, 1989	Written decision denying motion to withdraw guilty plea is filed by the trial court
March 16, 1989	Notice of Appeal filed
May 2, 1990	Supreme Court of the State of Wisconsin affirms the ruling of the trial court

REQUEST WARRANT

Date Submitted 5-18-87
Police Agency CA
DOB 03-05-61
Sex/Race M/Black
Ht/Wt 506/140
Eyes/Hair Bro/Blk
Comp No 2485-8
Arrest No 289B to
Time Request Warrant

Defendant McNEIL PAUL MATTHEW
Address 1833 N. 25th St. Milwaukee, WI.
Date of Offense March 9, 1987
Place of Offense 12105 Adams Rd. Town of Caledonia
Arresting Officer(s) Sgt. R. Stauss
Offense

PTAC FIRST DEGREE MURDER
PTAC Att. FIRST DEGREE MURDER
PTAC BURGLARY
PTAC Strong Arm Robbery

Section

940.01(1)
940.01(1)
943.10(2d)
943.32(1)

Victim
Restitution Amount $ See report.
Owed to See report.

Pertinent Information Suspect is currently being held by the Omaha Nebraska Police Department on warrants issued in Wisconsin for being a party to armed robbery. Milwaukee Co. Sheriff's Department is handling the warrants and suspect may waive extradition. . . . .

/s/ Sgt. [Illegible]

ACTION TAKEN BY DISTRICT ATTORNEY

Received on 5-27-87 By CMR Assigned to Date

☐ Complaint Only Offense as requested

☐ Complaint & Summons

☒ Complaint & Warrant Section

☐ Criminal Complaint will not be issued because

Prosecutor /s/ Gerald P. Ptacek Date 5/27/87

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

STATEMENT OF YOUR RIGHTS

Place Douglas Co. Jail

Date May 20th, 1987

Time 2:00 PM

Before we ask you any questions, it is my duty to advise you of your rights.

You have a right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish.

If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.

WAIVER—

Do you understand each of these rights? Yes

Realizing that you have these rights do you wish to answer questions or make a statement now? No.

WAIVER OF RIGHTS

I have read this statement of my rights and I fully understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed /s/ Paul McNeil

Witness: /s/ Eugene Welch

Witness: /s/ [Illegible]

Time: 2:05 PM

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

Case No. L-8411

STATE OF WISCONSIN,
Plaintiff,

vs.

PAUL M. MCNEIL,
Defendant.

JUDGMENT ROLE

May 22, 1987

Frank J. Liska, Jr.
Judicial Court Commissioner

Sharon Best
Court Reporter

Deft. in court (Paul M. McNeil) with Atty. Joseph Caton, Assistant D.A. Warren Zier.

Defendant given a copy of complaint and advised of contents. Defendant advised of maximum sentence and right to counsel. Court reviewed complaint and finds probable cause to hold defendant for further proceedings.

Statement by Public Defender J. Caton/Defendant indigent and Public Defender will provide counsel.

Case adjourned for Preliminary Hearing to 5-28-87, 1:30 p.m. in Branch 30.

Bail: $25,000 cash.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

Case No. L-8411

STATE OF WISCONSIN,
Plaintiff,

vs.

PAUL M. MCNEIL,
Defendant.

May 22, 1987

Before
Frank J. Liska, Jr.
Judicial Court
Commissioner

CHARGE: ROBBERY, ARMED AND MASKED
PARTY TO A CRIME (3 Counts)

[2] PROCEEDINGS

THE BAILIFF: This is Case No. L-8411, State of Wisconsin vs. Paul M. McNeil, Armed and Masked Robbery, Party to a Crime, three counts.

These are all Class B felonies. The maximum possible penalty is imprisonment for not more than 20 years as to each count. Do you understand the possible penalties, Mr. McNeil?

THE DEFENDANT: Yes, I do.

MR. ZIER: Actually, that's 25 years each count and a $10,000 fine or both. Because they're charged as masked and concealed.

MR. CATON: Mr. McNeil appears subject to reservation of jurisdictional objections, Joseph Caton with him. We have the complaint and waive its reading. I have read it to him.

Should you find it states probable cause, he will request a preliminary examination.

THE COURT: I'll make a finding of probable cause. We went through this drill once before, didn't we?

MR. CATON: Yes.

MR. ZIER: No, this is a three-defendant case.

MR. CATON: Mr. Dixon has gone through prior.

[3] THE COURT: Oh, okay, that's right. Yes, the reason they got him first is because his license plate said H. Dixon.

Having found probable cause, what bail is being requested?

MR. ZIER: $25,000 cash. There isn't an in-depth explanation of the reason for that, but it appears, at least from the complaint and the reports involved, that Mr. McNeil was really one of the principals involved here. Additionally, as the Court file may indicate, he was extradited from Nebraska. Actually, he wasn't extradited. He waived extradition from Nebraska.

I think in light of the offenses, of the exposure that he's facing, his obvious ability for interstate travel, I think that significant cash bail is appropriate. And I think that $25,000 is appropriate.

THE COURT: Considering that we eventually found him in Nebraska, Mr. Caton, boy, $25,000 seems to be really on the money.

MR. CATON: I have some things to say that may affect the cash amount. I don't have the judgment role with me, but is it true that Mr. Dixon got a $10,000 cash bail?

THE COURT: Could well be.

[4] MR. CATON: It may be academic, but this man is 26, single, he has two children in Milwaukee. He's been residing with the mother, Sandra Hall, at 5424

West Garfield. He had been in Milwaukee three years. He's got some extended family in Milwaukee, including his mother at 1833 North 25th, Rosie Rogers. He has six siblings in Milwaukee.

His prior record consists of a conviction in 1980 for a robbery. He's a high school graduate. He's in good health. He needs to deal with cocaine abuse. He's had some cardiac complications as a result of his cocaine abuse.

What I would ask you to consider is that when he learned that authorities from Wisconsin were seeking him in Omaha, he turned himself in and then he waived extradition to come back to Milwaukee. That he has roots here; that he does not have a lengthy prior record.

$25,000, I believe, is excessive under the circumstances given the other conditions—rather, elements of the bail.

THE COURT: One of the things that I asked at the hearing of Mr. Dixon was where were the other guys. And the officer who was standing here—either the officer who was standing here or the District Attorney who was standing here had some knowledge of the [5] surrounding facts. And his indication was that they believe that the jurisdiction was left behind by the other two because they knew that Mr. Dixon had been captured by the police. And apparently we still have one out. And he has still taken his leave of our hospitality.

Now, I recognize fully, fully the ties that Mr. McNeil has to this community. However, I must also recognize that having committed what are clearly some of the most serious offenses that we have on the books, that he has taken leave of our hospitality. He may have had second thoughts, but as we approach trial he may have second thoughts again. It looks like a very, very serious case.

He demonstrated his interstate capability. And it occurs to me that in order for me to be satisfied that Mr. McNeil is going to remain with us, that he will have to get sufficient numbers of his friends and relatives together to come up with $25,000 cash. I recognize fully

that he himself may not have those assets, but his assets and his strength and it is no less an asset than cash in the bank, is your friends, your relatives and community ties. It's your reputation. If they believe he's going to stay, I have no doubt that they will come up with $25,000.

MR. CATON: We request a preliminary examination.

[6] THE COURT: Carl, did you have anything to add?

MR. MANSKE: We're just recommending that we supervise him on a—supervise him while the case is pending and that we do random urine surveillance and some drug treatment.

THE CLERK: 5-28, 1:30.

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

STATEMENT OF YOUR RIGHTS

Place 821 W. State

Date 05-22-87

Time 755 PM

Before we ask you any questions, it is my duty to advise you of your rights.

You have a right to remain silent

Anything you say can and will be used against you in a court of law.

You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish.

If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.

WAIVER———

Do you understand each of these rights? Yes.

Realizing that you have these rights do you wish to answer questions or make a statement now? Yes.

———————

WAIVER OF RIGHTS

I have read this statement of my rights and I fully understand what my rights are. I am willing to make a

statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed /s/ Paul McNeil

Witness: /s/ [Illegible] Detective

Witness: ———————

Time: 8 PM—(2000 Hrs)

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH IV

RACINE COUNTY

87CF337

STATE OF WISCONSIN,
Plaintiff,

vs.

PAUL MCNEIL,
Defendant.

DECISION

Motion was brought before the Court for a new trial based on ineffective assistance of counsel. The defendant bases his claim because during a motion to suppress statements taken from the defendant, the Court was not presented with the proper record, nor was the case of *U.S. Ex rel Espinoza vs. Fairman*, 813 F. 2d, 117 (7th Cir. 1987) argued to the Court, which would have enabled it to make a proper decision suppressing all statements of the defendant.

To prevail on this motion, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.

The case which is cited by the defense is a case decided by the Seventh Circuit Court of Appeals, and it had been decided several months prior to the date of the motion brought before the Court. It is uncontroverted that there are no Wisconsin cases that have decided this issue in the same manner as the Seventh Circuit Court has.

There is also case law to the effect that the state courts are not bound by all decisions of the federal courts, and that the Seventh Circuit case may not be precedential.

The Court having heard testimony and having read the law presented by the parties makes the following Findings of Fact:

That defense counsel's performance was not deficient.

That the record as a whole, and the Court has gone over the whole record, shows that counsel argued at length the motions to suppress and submitted briefs to that effect and represented the defendant in a way which was more than just able and competent.

That the nonarguing of this federal case before the trial court was not a deficient performance which would have prejudiced the defense.

The Court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied.

Dated February 28, 1989.

BY THE COURT:

/s/ Emmanuel J. Vuvunas
HON. EMMANUEL J. VUVUNAS
Branch IV

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

No. 89-0539-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PAUL MCNEIL,
Defendant-Appellant.

CERTIFICATION

[Filed Nov. 1, 1989]

Before Brown, P.J., Scott and Nettesheim, JJ.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated, uncharged offenses? [1]

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[1] McNeil raises two additional issues on appeal. He argues that: (1) the state deliberately delayed the filing of the murder charge to further interrogate him so as to obtain a "sew-up" confession, thereby violating his right to due process of law; and (2) the trial court erred in refusing to allow him to withdraw his guilty plea. Upon a review of the record, we conclude that resolution of neither of these issues would resolve the issue that we certify.

FACTS

On May 21, 1987, Paul M. McNeil was escorted from Ohama, Nebraska by two Milwaukee county deputies acting on a criminal complaint and warrant charging McNeil with an armed robbery in West Allis. The deputies knew that McNeil was also a suspect in a Racine county murder and robbery.

The day before, while McNeil was in custody in the Omaha jail, the deputies had advised him of his *Miranda* rights. He declined to talk to them and the conversation ended. On the way back to Milwaukee, the deputies did not question McNeil about either the Milwaukee county robbery or the Racine county murder and robbery, but told him it would be to his advantage to tell his side of the story.

An initial appearance on the Milwaukee county robbery was held on May 22, 1987. McNeil was represented by a public defender. Later that evening, a Milwaukee county detective went to McNeil's cell to question McNeil about the robbery. After being advised of his rights and signing the waiver, McNeil himself brought up the Racine county murder. The questioning remained on that subject for the rest of the session.

Questioned again on May 24 and 26 about the Racine county crimes, McNeil gave inculpatory statements. Prior to each interrogation session, McNeil was advised of his rights and signed a waiver of them. On May 27, a criminal complaint was filed formally charging him with the Racine county murder and robbery. Motions to suppress his inculpatory statements were denied. Upon a plea of no contest, he was ultimately convicted of being a party to the crimes of second-degree murder, attempted first-degree murder and armed robbery.

McNeil now appeals the denial of the suppression motions, asserting that the statements were obtained in violation of his fifth amendment right to counsel.

DISCUSSION

McNeil contends that his request for counsel at the initial appearance constituted an invocation of his right to counsel under both the fifth and sixth amendments. He further claims that such invocation precluded all further police-initiated interrogation without the presence of counsel whether the interrogation concerned the charged offenses or an uncharged, unrelated one.

The fifth amendment's prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice that the individual has the right to remain silent and also the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

When an accused invokes his fifth amendment right to have counsel present during custodial interrogation, unless he himself initiates the communication, exchanges or conversations with the police, he is not subject to further interrogation on that charge until counsel has been made available to him. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Even if he has been advised of his rights, a valid waiver cannot be established by showing only that he responded to further police-initiated custodial interrogation. *Id.* at 484.

The *Edwards* rule has been expanded to apply when an accused invokes his sixth amendment right to counsel. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). Thus, invoking one's sixth amendment right to counsel on a given offense, as McNeil did in accepting representation at the initial appearance on the Milwaukee county robbery, precludes further police-initiated interrogation on that charge unless counsel is present. *Id.*

When invoked on fifth amendment grounds, the *Edwards* rule has also been expanded to include uncharged offenses. *Arizona v. Roberson*, 486 U.S. 675, ——, 108 S. Ct. 2093, 2099 (1988). Under *Roberson*, when a suspect invokes his fifth amendment right to counsel during

custodial interrogation, the rule bars police-initiated interrogation even on a separate, unrelated offense. *Id.* However, McNeil does not claim that he specifically invoked his fifth amendment right to counsel during custodial interrogation.

But McNeil does assert that the *Edwards* rule should be applied in his case nonetheless. He argues that because he was in continuous custody, invocation of his sixth amendment right to counsel should trigger the fifth amendment-based *Edwards* rule as to any other offense as well. In other words, he contends that acceptance of the public defender's services at the initial appearance constituted a general request for the assistance of counsel, a request broad enough to also preclude police-initiated questioning, in the absence of counsel, on other charges.

Wisconsin courts have never addressed this precise question.[2] The Seventh Circuit Court of Appeals has, however, in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987), and McNeil urges that Wisconsin follow its lead.

The facts in *Espinoza* closely parallel those in McNeil's case. Espinoza, arrested on a weapons charge, was represented by counsel at his arraignment on that charge. Later, while still in custody but without the presence of counsel, he was interrogated about an unrelated murder to which he confessed. At his trial on the murder charge, the court denied his motion to suppress the confession, and he was convicted.

---

[2] This court addressed a similar, though not identical, scenario in *State v. Lale*, 141 Wis.2d 480, 415 N.W.2d 847 (Ct. App. 1987). There, expressly adopting *Maine v. Moulton*, 474 U.S. 159 (1985), and *Moran v. Burbine*, 475 U.S. 412 (1986), we held that an unrepresented defendant's incriminating statements to the police on unfiled charges were admissible because the sixth amendment right to counsel was not implicated as to those charges. *Lale* did not, however, address the fifth amendment question McNeil poses.

After exhausting his state remedies, Espinoza petitioned for a writ of habeas corpus. The district court granted the writ, holding that Espinoza had both a fifth and sixth amendment right to counsel at the interrogation and that he had not validly waived either right.

The Seventh Circuit Court of Appeals affirmed the decision, but on different grounds. The appeals court disagreed that a sixth amendment right to counsel attached at the time of interrogation. *Id.* at 120. Though Espinoza plainly had a fifth amendment right to counsel at that point, he had not invoked it. However, the court determined that the invocation at his arraignment of his sixth amendment right to counsel also constituted an invocation of his fifth amendment right. The court held that, absent evidence to the contrary, an individual who requests counsel at the time of his arraignment on a criminal charge is presumed to invoke both his fifth and sixth amendment rights to counsel. *Id.* at 123.

The state argues that Wisconsin need not, and should not, follow *Espinoza*. *Espinoza* need not be followed because federal appeals court decisions are not binding on Wisconsin state courts. *Thompson v. Village of Hales Corners*, 115 Wis.2d 289, 307, 340 N.W.2d 704, 713 (1983).

Espinoza should not be followed, the state continues, because it contends the decision is wrong. The state maintains that requesting counsel at an initial appearance does not invoke one's fifth amendment right to counsel, and thereby trigger the *Edwards* rule, because a fifth amendment right to counsel attaches only when an accused is both in custody, *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980), and subject to interrogation, *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980). McNeil was in custody at the initial appearance, but he was not subject to interrogation.

The state further asserts that requesting counsel at an initial appearance does not trigger the *Edwards* rule as to other, unrelated charges because that rule is prophylactic in nature and is meant to protect the exercise of one's fifth amendment rights from government coercion. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987).

The danger of government coercion is not similarly present, the state argues, where the accused has not requested counsel either in the context of custodial interrogation or in response to *Miranda* warnings. In fact, McNeil was questioned on the separate charge only after being fully, and repeatedly, apprised of his *Miranda* rights, including the right to counsel.

In further support of the premise that his request for counsel at the initial appearance on the robbery charge invoked his fifth amendment right to counsel for all purposes, McNeil maintains that an invocation of the right to counsel is to be given a "broad, rather than a narrow, interpretation." *Espinoza*, 813 F.2d at 123 (quoting *Jackson*, 475 U.S. at 633). McNeil claims the state failed to show that he intended to limit the exercise of his right to counsel to the initial appearance on the robbery charge, and therefore it must be presumed that he intended also to invoke his fifth amendment right.

The state counters that the issue is not how broadly the request for counsel should be interpreted, but whether such a request was made at all. Moreover, interpretation is required only where the individual's words, understood as ordinary people would understand them, are ambiguous. *Barrett*, 479 U.S. at 529. Here, McNeil himself brought up the Racine county crimes and signed several written waivers of his right to counsel. In addition, he questioned the necessity of the repeated *Miranda* warnings, stating he understood his rights because he had been advised of them numerous times.

In sum, several United States Supreme Court cases offer a measure of direction on the resolution of this case,

though none answers it completely. *Edwards* holds that once the fifth amendment right to counsel is invoked during custodial interrogation, no further interrogation without counsel is allowed unless the individual initiates it. Under *Jackson*, further police-initiated interrogation on the same charge is prohibited whenever the sixth amendment right to counsel is invoked, not just during custodial interrogation. And *Roberson* says that invoking one's fifth amendment right to counsel during custodial interrogation precludes further police-initiated interrogation, without counsel, on any charge.

McNeil does not claim to have specifically invoked his fifth amendment right to counsel. He argues that the invocation of his sixth amendment right at the initial appearance on the Milwaukee county armed robbery charge should also be construed as an invocation of his fifth amendment right to counsel as to any other offenses because he was in continuous custody. McNeil's position is consistent with that assumed by the Seventh Circuit in *Espinoza*.

CONCLUSION

No Wisconsin law exists on the precise scope of the rights invoked when an individual requests the assistance of counsel. Supreme Court direction is desirable. For these reasons, we respectfully certify this case to the Wisconsin Supreme Court for review and determination, pursuant to Rule 809.61, Stats.

SUPREME COURT OF WISCONSIN

No. 89-4539 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PAUL MCNEIL,
Defendant-Appellant.

Argued January 26, 1990—Decided May 2, 1990

(On certification from the court of appeals)

STEINMETZ, J. The issue certified is whether an accused's request for or appearance with counsel at an initial appearance on a charged offense constitutes an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated, uncharged offenses. The trial court answered "no" and we agree.

Other issues in the case include whether the state illegally delayed filing the murder charges to conduct further investigation so as to obtain a sew-up confession. The trial court answered "no." We do not believe the issue presented is consistent with the facts.

Another issue before us is whether the defendant's statements should have been suppressed because they were obtained in violation of the defendant's fifth amend-

ment right to be silent. The trial court answered "no" and we agree.

The final issue raised is whether the trial court should have allowed the defendant to withdraw his guilty plea and granted him a new trial. The trial court answered "no" and we agree.

The case is before the court by certification from the court of appeals granted pursuant to Rule 809.61, Stats. Paul McNeil, the defendant-appellant, seeks review of a judgment of conviction entered on March 18, 1988. Racine county circuit court Judge Emmanuel J. Vuvunas entered judgments of convictions against the defendant for the crimes of party to second-degree murder, party to attempted first-degree murder, and party to armed burglary. The sentence imposed by the judge was an indeterminate term of not more than 20 years for the party to second-degree murder conviction, 20 years for the party to attempted first-degree murder, and 20 years for party to armed burglary, all counts to be consecutive to one another for a total of 60 years.

This matter was initiated by a felony warrant request by Sergeant Robert Stauss of the town of Caledonia Police Department of the Racine county district attorney's office. The complaint was issued on May 27, 1987, by the then Racine county District Attorney Gerald Ptacek.

The warrant was served on the defendant who was being held in the Milwaukee county jail on an unrelated armed robbery charge and was brought before a Racine county magistrate on June 4, 1987. A preliminary examination was held on June 11, 1987, and subsequently various motions including motions to suppress the defendant's statements were filed. Judge Vuvunas denied the motions to suppress after five hearings were held.

A postjudgment notice of motion and motion to withdraw the guilty plea were presented. The motion re-

quested a withdrawal of the defendant's guilty plea as a result of a manifest injustice because the court had ruled improperly when it ruled in favor of the state and against the claim of ineffective assistance of counsel. McNeil argued that defense counsel was incompetent during the course of the hearings on suppression of statements because counsel did not bring to the court's attention the most recent case law and supporting facts dealing with defendant's situation.

On hearings on the motion to withdraw the guilty plea, Judge Vuvunas ruled that trial counsel had not been ineffective and that he was now considering the case law and record which may not have been available earlier. He stated that even if he had been aware of the case law at the time he made his original decision, he would have ruled the same way and allowed the defendant's statements to be admitted into evidence.

The development of this case begins on May 21, 1987, when two Milwaukee county deputies escorted the defendant back to Milwaukee from Omaha, Nebraska. They had taken defendant into custody on a criminal complaint and warrant charging him with an armed robbery arising out of an incident in the city of West Allis in Milwaukee county. The following day, May 22, 1987, the defendant was brought before court commissioner Frank J. Liska, Jr. in Milwaukee county. Bail was set and the matter was scheduled for a preliminary examination. The defendant had an attorney with him in court at that time.

Later in the day on May 22, and again on May 24 and May 26, still in the custody of the Milwaukee authorities, the defendant was interrogated regarding the episode that was to provide the basis for the criminal charges in this Racine county prosecution. Those charges were made by the filing of a criminal complaint on May 27, 1987. An initial appearance on those charges was held on June 4, 1987, in Racine county pursuant to a writ.

The critical question that must be answered in resolving the issue of the admissibility of the defendant's statements is whether an accused who has requested counsel at his initial appearance has thereby invoked not only his sixth amendment right to counsel, but his fifth amendment right to counsel as well.

The defendant appeared at his initial appearance in Milwaukee county for the unrelated offense of robbery. There he was represented by an attorney from the public defender's office. The record does not reveal whether he requested counsel at his initial appearance, only that he appeared with counsel at that appearance.

Defendant contends that since he appeared with counsel at the initial appearance on the unrelated Milwaukee county charge which triggered his sixth amendment right to counsel, he could not be subject to any further interrogation by the authorities about any offenses, including the Racine county offenses charged in this case, unless he initiated further communication, exchanges, or conversations with the police pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981). Under the *Edwards* rule, when a suspect invokes his fifth amendment right to counsel during a custodial investigation, no further interrogation may be commenced by the authorities until counsel has been made available to him, unless he himself initiates further communication, exchanges, or conversations with the police. *Id.* at 484-85.

The defendant contends that his appearance with counsel at the initial hearing on the Milwaukee county charges constituted an invocation of his sixth amendment right to counsel that under the fifth amendment *Edwards* rule precluded the police from initiating any further interrogation of him, including questioning regarding the unrelated Racine county crimes. He argues that because it was the police that initiated the further interrogation that produced his statements regarding the Racine county

crimes, those statements should have been suppressed under the *Edwards* rule.

There are two distinct rights to counsel when a defendant is interrogated by the police. The first is the fifth amendment right to counsel recognized in *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). That right applies whenever a defendant is subjected to custodial interrogation irrespective of whether or not he has been formally charged with the offense to which the interrogation relates. *Id.* at 471. That right to counsel is not directly conferred by the fifth amendment, but rather is a prophylactic rule designed to safeguard the privilege against self-incrimination that is directly conferred by the fifth amendment. *See Solem v. Stumes*, 465 U.S. 638, 644 n.4 (1984).

The other right to counsel potentially applicable at an interrogation is the guarantee of the assistance of counsel in criminal proceedings directly conferred on a defendant by the sixth amendment.[1] That right to counsel attaches only "at or after the time that judicial proceedings have been initiated against [the accused]—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Such right is only applicable to interrogation that occurs subsequent to the initiation of formal judicial proceedings relating to the charge about which the interrogation is concerned.

---

[1] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accussed shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

Although it was initially recognized only in the fifth amendment context, the *Edwards* rule also applies to an invocation of the sixth amendment right to counsel. Thus, the *Edwards* rule also applies whenever an accused invokes his sixth amendment right to counsel, not just when he invokes it during the course of custodial interrogation. The invocation of right to counsel at an initial appearance will therefore trigger the *Edwards* rule. *See Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

While the *Edwards* rule applies to both the fifth and sixth amendment rights to counsel, the scope of its application differs depending on which of the two rights is being invoked. In the fifth amendment context, an invocation of the right during custodial interrogation precludes further questioning on any offense, not just the one that was the subject of the interrogation. *Arizona v. Roberson*, 486 U.S. 675, 685 (1988) (distinguishing the sixth amendment right to counsel from the fifth amendment prophylactic right to counsel to protect against self-incrimination).

In contrast, an invocation of the sixth amendment right to counsel on one offense does not trigger the *Edwards* rule with respect to interrogation on other offenses, at least not those that have not been charged. As to the uncharged offenses, an accused has no sixth amendment right to counsel, so interrogation on those uncharged offenses cannot be deemed "in derrogation of [the] Sixth Amendment right invoked [by the accused] at his arraignment" on a charged offense. *People v. Buckles*, 155 Mich. App. 1, 399 N.W.2d 421, 423 (1986). Since there is no sixth amendment right to counsel on uncharged offenses, an invocation of that right at an initial appearance or arraignment on a charged offense does not bring the expanded scope of the fifth amendment *Edwards* rule into play with respect to interrogation on uncharged offenses. *See Moran v. Burbine*, 475 U.S. 412, 431 (1986); *Maine v. Molton*, 474 U.S. 159, 180 n.16 (1985).

The defendant cites a case from the Seventh Circuit Court of Appeals as indistinguishable. *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 123 (7th Cir. 1987), expressly held: "that individuals who invoke their right to counsel at their arraignment are invoking both their Sixth Amendment and their Fifth Amendment rights." This court is not bound by the *Espinoza* holding as precedential value. *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983).

Likewise, the United States Supreme Court has recently ruled on *Butler v. McKeillar*, —— U.S. —— (March 5, 1990). The facts in *Butler* indicate that, unlike McNeil, the defendant invoked his fifth amendment right to counsel upon arrest on an unrelated assault and battery charge. The defendant then retained counsel who appeared with him at a bond hearing on the unrelated charge on August 31, 1980. The defendant was subsequently informed that he was a suspect in a murder. He was read his *Miranda* rights, stated he understood his rights and signed two waiver forms. The defendant was interrogated concerning the murder and confessed. At no time did he request counsel during this interrogation. The defendant was charged with the murder and convicted.

The issue before the United States Supreme Court in *Butler* concerns the retroactivity on collateral attack of *Roberson*. The *Butler* Court held that *Roberson* was not retroactive on collateral attack, and it affirmed Butler's conviction.

Although proponents of *Espinoza* and cases following the holding in *Espinoza* might interpret *Butler* as changing *Roberson* to affect an outcome on the certified issue now before us that is on all fours with *Espinoza*, we disagree. We continue to interpret *Roberson* to apply only to the invoked fifth amendment prophylactic pro-

tection of "having an attorney present to counteract the inherent pressures of custodial interrogation . . . ." *Roberson*, 486 U.S. at 685.

We do not read *Butler* and *Roberson* as affecting a transmutation of the sixth amendment right to counsel into a fifth amendment right to counsel. We hold that a defendant does not invoke his or her fifth amendment right to counsel by invoking the sixth amendment right to counsel at an initial appearance.

The fifth amendment right to counsel recognized in *Miranda* is not one that attends a criminal suspect under all circumstances and in every situation. Rather, it attaches only when an accused is in custody, *United States v. Henry*, 447 U.S. 264, 273 n. 11 (1980), and subject to custodial interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 198 (1980). An accused may well be in custody at an initial appearance, but he is not being subjected to interrogation. Thus, there is no fifth amendment right to counsel at an initial appearance. When an accused invokes his sixth amendment right to counsel at that appearance, there is no basis for concluding that he is invoking his fifth amendment right to counsel.

Connecticut v. Barrett, 479 U.S. 523, 528 (1987), which discusses the fifth amendment right to counsel, instructs that one should examine the issue by "reference to [the] prophylactic purpose" of *Miranda* and, therefore, of the *Edwards* rule. By doing this, one reaches the conclusion that a sixth amendment request for counsel at an initial appearance should not be deemed an invocation of the fifth amendment right to counsel that would trigger the *Edwards* rule. The *Edwards* rule is "designed to insulate the exercise of Fifth Amendment rights from the government 'compulsion, subtle or otherwise,' that 'operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.'" *Barrett*, 479 U.S. at 528.

There might well be legitimate concern that a reinitiation of interrogation after a request for counsel at an interrogation session or in response to *Miranda* warnings would constitute "subtle compulsion" because it might lead a defendant to question whether the police really intend to honor his right to counsel. However, when an accused has not requested counsel in the context of custodial interrogation or in response to *Miranda* warnings pursuant to the fifth amendment, but rather invokes his sixth amendment right at his initial appearance on a criminal charge, it is difficult to see what "subtle compulsion" would exist if the police were to approach the defendant and seek to interrogate him on an unrelated crime after providing a full warning of his *Miranda* rights, including the right to counsel.

The defendant relies on language in *Jackson*, 475 U.S. at 633-34 n.7, for his position that a request for counsel at an initial appearance invokes the fifth amendment right to counsel. The proffered language from *Jackson* states:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking, he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.

Defendant's reliance is misplaced. In that passage, the Supreme Court is quoting a passage from the Michigan Supreme Court's decision in *People v. Bladel*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984). However, the Michigan Supreme Court in its decision expressly held that a defendant who requests counsel at an arraignment only invokes the sixth amendment right to counsel and does not thereby invoke his fifth amendment right to counsel. *Bladel*, 421 Mich. at 52-53, 365 N.W.2d at 62; *see also Jackson*, 475 U.S. at 630 n.4 (noting that the Michigan court did not rely on the fifth amendment and expressly refusing to comment on the Michigan court's fifth amendment analysis).

The language in *Jackson*, which requires a broad interpretation to be accorded a defendant's invocation of his sixth amendment right to counsel, does not mean that the court must transmute the invocation of that right into an invocation of another right, the fifth amendment right to counsel. Rather, in context, the *Jackson* decision used the quoted passage from *Bladel* in an attempt to assess how broadly to interpret the defendant's invocation of only his sixth amendment right to counsel. The *Jackson* court refused to accept the state's argument that the defendant's sixth amendment request for counsel in *Bladel* was a limited invocation applying only to representation in formal legal proceedings. Instead, the Court stated that "the settled approach to questions of waiver" required a broad interpretation be placed on the defendant's request. *Jackson*, 475 U.S. at 633.[2] The breadth of one's invocation of the sixth amendment right to counsel is clearly not at issue in the case now before us. At issue is whether invocation of the sixth amendment right to counsel automatically transforms into an invocation of the fifth amendment right to counsel.

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[2] The facts in *Bladel* are distinguishable from those in the case now before us in that at all times *Bladel* concerned only three counts of first-degree premeditated murder upon which Bladel was arraigned.

In *Barrett*, 479 U.S. at 529, the Supreme Court analyzed the defendant's unambiguous invocation of his fifth amendment right to counsel at a custodial interrogation and the scope of his invocation and gave it the broadest possible interpretation on consideration of waiver. The *Barrett* Court concluded that a fifth amendment request for counsel at a custodial interrogation before defendant would give police a written statement did not prohibit the police from obtaining and using at trial oral statements volunteered by the defendant. The court rejected the defendant's argument that "broad effect" must be given "to requests for counsel that [are] less than all-inclusive." The Supreme Court stated:

> Barrett made clear his intentions [he was willing to give an oral statement, but not a written statement in the absence of counsel] and they were honored by police. To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

479 U.S. at 529-30. (Footnote omitted.)

The "ordinary meaning" of a defendant's request for counsel at an initial appearance is only that he is invoking his sixth amendment right to counsel in the pending prosecution. When a defendant invokes his sixth amendment right to counsel in a pending prosecution by requesting or accepting counsel at the initial appearance, it need not be viewed as an invocation of the fifth amendment right precluding interrogation on unrelated crimes any more than the limited invocation of the fifth amendment right to counsel in *Barrett* needed to be viewed as an invocation of the full fifth amendment right.

Other jurisdictions agree with our holding which rejects the *Espinoza* rationale and keeps the prophylactic protections provided under the fifth amendment right to counsel separate from the sixth amendment right to

counsel. The Michigan Supreme Court in *People v. Crusoe*, 433 Mich. 666, —— N.W.2d ——, 1989 Mich. LEXIS 2823, 27 [*31] (Dec. 8, 1989), refused to extend the *Roberson* rationale beyond its express fifth amendment application to include extension of the sixth amendment invocation of right to counsel to shield the defendant from postarraignment interrogations on unrelated charges. In so holding, the *Crusoe* court expressly rejected and reversed the court of appeals decision which adopted the analysis of *Espinoza*: "We find no authority for the adoption of a rule that a defendant's request for court appointed counsel at an arraignment invalidates a waiver of a defendant's right to counsel per se under *Miranda* during a subsequent police-initiated interrogation concerning a different and unrelated offense." (Footnote omitted.) (Citing *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989)).

The Second District Court of Appeals in *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989), asserted that the situation before it was "quite different from [that] of *Edwards*, *Jackson* and *Roberson*." That court said: "Roberts would have us hold that, once an accused's Sixth Amendment right to counsel attaches, his Fifth Amendment rights become unwaivable in the context of a separate investigation. Such a conclusion comports with neither the letter nor the spirit of *Edwards* and its progeny." *Id.*

The court in *State v. Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 853 (1989) offered an identical conclusion:

> In the end, we hold Stewart's Sixth Amendment right to counsel did not attach on these burglary charges until months after his confessions. He did not invoke his Fifth Amendment right to counsel when he requested an attorney at an arraignment on an unrelated charge. The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during

> in-custody interrogation, which was not occurring at the time Stewart requested counsel. Subsequently, prior to giving his confession, Stewart was given *Miranda* warnings and did not invoke his Fifth Amendment right at that time. There has been no showing of confusion on the part of the defendant, nor trickery on the part of the State. Extension of the *Edwards* rule to this fact scenario would constitute a misapplication of that prophylactic rule.

The defendant next complains that there was an unreasonably long detention before his initial appearance on the Racine county charges that requires suppression under the rule in *Phillips v. State*, 29 Wis. 2d 521, 534, 139 N.W.2d 41 (1966). Regarding the nature of the *Phillips* rule and what is ultimately at issue when a *Phillips* claim is raised, this court has stated:

> The suppression of sew-up confessions is based on the rule that a defendant who has not yet been charged may be taken into custody and interrogated only for a period reasonably necessary for the State to decide whether to release him or to make a formal complaint. A detention for any longer period violates due process and renders any confession obtained during the unreasonable period inadmissible. *Briggs v. State*, 76 Wis. 2d 313, 323, 251 N.W.2d 12 (1977); *Klonowski v. State*, 68 Wis. 2d 604, 229 N.W.2d 637 (1975); *Phillips v. State*, 29 Wis. 2d 521, 534-5, 139 N.W.2d 41 (1966). However, 'A confession does not become inadmissible as a "sew-up" confession merely because the state, prior to the confession, had information sufficient to sustain a charge. The question revolves solely on the point whether the delay was inordinate and the detention illegal.' *Briggs v. State, supra* at 324; Krueger v. State, 53 Wis. 2d 345, 357, 192 N.W.2d 880 (1972).

State v. Benoit, 83 Wis. 2d 389, 404-05, 265 N.W.2d 298 (1978).

We hold that the facts of this case are not consistent with a conclusion that the *Phillips* rule was violated. McNeil promptly appeared before a judicial court commissioner on the Milwaukee county armed robbery charge for which he had been arrested and for which he was in custody. The timely appearance rendered his subsequent detention in the Milwaukee county jail lawful. The statements regarding his conduct in Racine county were given while he was in lawful custody in Milwaukee county.

The defendant's argument on this issue then seems to switch from the due process concerns of the *Phillips* rule to an examination of a possible sixth amendment violation under *State v. Lale*, 141 Wis. 2d 480, 415 N.W.2d 847 (Ct. App. 1987). Here, McNeil suggests that the state deliberately delayed filing the Caledonia murder charges as a pretext to allow further investigation of these unfiled charges without fear of violating his sixth amendment right to counsel. This is a direct reference to principles discussed in *Lale* wherein the court of appeals adopted as law combined interpretations of *Moulton*, 474 U.S. 159, and *Burbine*, 475 U.S. 412, which state that a defendant's sixth amendment right to counsel is not involved when the police obtain incriminating statements on unfiled charges that are unrelated to a filed charge.

The court of appeals in *Lale* noted the existence of a possible exception to this rule which the defendant argues is applicable here. The exception states that a possible violation of the sixth amendment may occur when "the government formally files on some charges but delays filing of another charge as a pretext to facilitate investigation of that unfiled charge without being hampered by the sixth amendment . . . ." *Lale*, 141 Wis. 2d at 489. The court of appeals suggested that under such circumstances "bad faith may exist." *Id.*

Here, on December 14, 1987, at the defendant's hearing on the motion to suppress the confession, the trial court on the facts presented expressly refused to find any bad faith in how the authorities handled this case. The court specifically stated:

> I don't think there has been any showing that there was conduct in bad faith being done here. I think the officers who were going through this in a case which involves a defendant who was involved in lots of different problems. Involved in several different investigations. Certainly from the testimony that's come through here, I don't think there's been any showing like that at all.

The trial court's findings of fact on the bad faith issue will not be overturned unless clearly erroneous. *State v. Owens*, 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989). Here, the defendant has offered no showing to support a determination that the trial court's findings were clearly erroneous. Thus, the trial court's refusal to find bad faith removes this case from the *Lale* exception, and we agree with the trial court that McNeil's sixth amendment right to counsel under the *Lale* theory has not been violated.

The defendant next claims his statements should have been suppressed because the police did not "scrupulously honor" his request to remain silent as they are required to do under the United States Supreme Court's decision in *Michigan v. Mosley*, 422 U.S. 96 (1975). Determining whether the right to silence has been scrupulously honored required the application of constitutional principles to the facts of the case and is subject to independent appellate review.

There are five factors that are to be considered in deciding whether an invocation of the right to silence has been "scrupulously honored." Those factors as adopted from *Mosley*, 423 U.S. at 104-05 and as enumerated in

State v. Hartwig, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985), are:

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time . . . . (3) The suspect was given complete *Miranda* warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

The factors are not to be woodenly applied. *Id.* at 284-85. They provide a framework of analysis to aid in determining the essential issue of whether the defendant's right to silence was scrupulously honored. *Id.*

All five factors are satisfied in this case. The defendant initially invoked his right to silence and the interrogation was terminated. The questioning was resumed after the passage of a significant period of time, either one or two days depending on the version accepted, the defendant's or the police. *Cf. State v. Turner*, 136 Wis. 2d 333, 357, 401 N.W.2d 827 (1987) (periods of 20 and 24 hours have been deemed significant time spans for *Mosley* purposes).

Prior to the second and subsequent interrogations, the defendant was given a full and complete set of *Miranda* warnings.[3] The officers conducting those interrogations made sure the defendant understood each of the rights about which the warnings advised the defendant and secured an express waiver of them.

A different officer, Officer Butts, resumed the questioning at the second interrogation. The defendant's initial invocations of his right to silence were made when Detective Smukowski attempted to interrogate him. The

[3] The advice given by the dissent was fulfilled by the officers in this case and served as part of the basis for the majority opinion.

subsequent interrogations were conducted by different officers. The second and subsequent interrogations were restricted to a crime that had not been the subject of the initial interrogation.

Prior to his arrest and return to Milwaukee, the defendant's girlfriend had told Officer Butts who initiated the second interrogation after the defendant invoked his right to silence that he (the defendant) "wanted to talk to [the officer] when he got back to Milwaukee." With this indication of a desire to talk to the interrogating officer, it does not appear that McNeil's previously invoked right to silence was not scrupulously honored when that officer approached him and, after giving *Miranda* warnings, determined that the defendant was willing to talk to him about his part in the Racine county town of Caledonia crimes.

The defendant immediately raised to the police the subject of the Caledonia incident that provided the basis for the charges in this case. Notwithstanding his initial invocation of his right to silence regarding the West Allis case when he was interrogated in Omaha, the defendant affirmatively wanted to speak to the police about the Caledonia crime at issue in this case. Under the circumstances, there is no basis for finding that his right to silence was not scrupulously honored.

The defendant also argues that he should be allowed to withdraw his guilty plea and should be granted a new trial. He bases his request on the theory of ineffective assistance of counsel. The ineffective assistance of counsel argument, which was raised in McNeil's notice of motion and motion to withdraw the guilty plea, was based on trial counsel's failure to originally brief and argue the *Espinoza* case on pretrial motions to suppress evidence.

A hearing was held on the motion to withdraw the guilty plea at which the *Espinoza* case was argued. Ex-

hibits were also accepted into evidence which established that the defendant had been before a Milwaukee county magistrate in the morning hours of May 22, 1987, on the Milwaukee robbery charges and that he was represented by a state public defender at that time. In relevant part, the trial court's decision on the motion stated:

> The Court having heard testimony and having read the law presented by the parties makes the following Findings of Fact:
>
> That defense counsel's performance was deficient . . . .
>
> The Court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied.

In briefs reviewed by this court, McNeil states that his ineffective assistance of counsel argument is made moot by the trial court's hearing and decision on the issue. We agree. The argument was made on reliance of case law that was not and is not precedent in the state of Wisconsin. McNeil's defense was therefore not prejudiced by trial counsel's failure to expressly argue *Espinoza*.

McNeil then apparently changes his argument on brief on this issue to assert that the defendant's sole basis for entering a no contest plea was the trial court's denial of his suppression motion. He argues that the denial of his motion violated his constitutional rights and therefore justifies reversal of his conviction and a new trial. This amounts to an argument that the trial court committed prejudicial error by denying the motion. Because we hold against McNeil on all of the issues presented in this case and because a conclusion that the trial court committed prejudicial error depends upon our holdings here,

we hold that the trial court did not commit prejudicial error when it denied the suppression motion.

By the Court.—The order of the Racine county circuit court is affirmed.

CHIEF JUSTICE HEFFERNAN (dissenting). The majority concludes that an accused who requests counsel at an initial appearance and remains in continuous custody has not invoked the fifth amendment right to counsel which precludes police-initiated interrogation on unrelated, uncharged offenses. I disagree.

The majority states that the issue is whether invocation of the sixth amendment right to counsel automatically transforms into an invocation of the fifth amendment right to counsel. (Majority op. at p. —.) The fifth amendment protection against self-incrimination provides the right to counsel at custodial interrogations, irrespective of whether a defendant has been formally charged or not. *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Arizona v. Roberson*, 486 U.S. 675 (1988). Hence, the issue in this case is whether the defendant invoked his fifth amendment right to counsel when he requested assistance of counsel at an initial appearance instead of while being interrogated afterwards.

I am persuaded that the reasoning of the Seventh Circuit Court of Appeals in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), cert. denied. *Fairman v. Espinoza*, 483 U.S. 1010 (1987), is correct and should be followed by this court. *Espinoza* holds that, when a defendant requests[1] an attorney at an initial

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[1] In *Espinoza*, the defendant accepted the appointment of counsel, but did not specifically request counsel. The *Espinoza* court concluded that the defendant's unqualified acceptance of counsel at his arraignment was equivalent to a request for counsel and that it was not necessary for the defendant to specifically request counsel in order to invoke this right. 813 F.2d at 123.

appearance and remains in custody, the court should presume that the defendant has invoked his fifth amendment right to counsel and police-initiated interrogation is thereafter prohibited on any crime. *See Edwards v. Arizona*, 415 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988).

The majority rejects the Seventh Circuit's approach by distinguishing between a defendant who makes a request for assistance of counsel to a police officer while subject to a custodial interrogation and a defendant who makes a request for assistance of counsel to a magistrate and thereafter remains in continuous custody. The majority asserts that, while a defendant is in custody at an initial appearance, he is not being interrogated. Because the defendant is not being interrogated when he makes his request for an attorney, the majority leaps to the conclusion that there is no danger of compelled testimony and, therefore, the fifth amendment right to counsel which arises from the protection against self-incrimination is not implicated. The majority misreads the holdings of *Miranda v. Arizona*, *supra*, and *Edwards v. Arizona*, *supra*.

Miranda established that the fifth and fourteenth amendmentst require that, prior to any custodial interrogation, defendants be informed of their right to remain silent and their right to have counsel present "during custodial interrogation." *See Edwards*, 451 U.S. at 481-482. This does not mean that the *request* for counsel must be made "during custodial interrogation." In *Edwards v. Arizona*, the Supreme Court established a bright-line rule that, if a defendant requests counsel while in custody, police-initiated interrogation must cease until an attorney is present. *Edwards* added protection to prevent police from badgering a defendant into waiving previously asserted *Miranda* rights. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). Nowhere does *Edwards* or any of its progeny indicate accuseds must assert their *Miranda* right to counsel while they are being interrogated. The request must be made while the defendant is in custody, prior to, or during, an interrogation.

It is apparent that there is danger of "subtle compulsion" when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependant upon the subject matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated.

Finally, I disagree with the majority that recent United States Supreme Court decisions provide support for its position. To the contrary, recent Supreme Court decisions support the Seventh Circuit Court of Appeals decision in *Espinoza*. First, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court resolved a conflict among the circuits and state courts, accepting the position taken by the Seventh Circuit in *Espinoza*, 486 U.S. at 679, n.3. The *Roberson* court held that, when a suspect requests counsel, the fifth amendment bars police-initiated interrogation on any crime, even one which was not the subject of the original interrogation. Recently, in *Butler v. McKellar*, —— U.S. —— (March 5, 1990) (formerly reported at *Butler v. Aiken*), the Supreme Court held that *Roberson* could not be applied retroactively in cases on collateral review and, for that reason, the particular defendant could not reap the benefit of the rationale of the *Espinoza* court. The issue raised before the Court of Appeals in *Butler* was whether *Espinoza* required the police, during continuous custody, to refrain from all further questioning on any offense once an accused invokes his

right to counsel. In resolving this issue, the Fourth Circuit Court of Appeals rejected the Seventh Circuit's holding in *Espinoza*. *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988). After the Supreme Court issued its decision in *Roberson*, the Fourth Circuit Court of Appeals, on defendant's petition for rehearing, acknowledged that its decision, rejecting the *Espinoza* rationale, was doubtful but that the defendant was not entitled to the retroactive benefit of *Roberson*, 864 F.2d 24, 25 (4th Cir. 1988), *reh'g denied*. The Supreme Court agreed that Butler was not entitled to a retroactive application of *Roberson*. The court noted the discrepancy between the Seventh Circuit and the Fourth Circuit as evidence that the outcome in *Roberson* was not clear from the earlier holding in *Edwards* and therefore constituted a "new rule," hence, not calling for retroactive application. While the Supreme Court limited its holding to the retroactive application of *Roberson*, its approval of *Espinoza* is significant. I conclude that the *Espinoza* court's analysis of the fifth amendment right to counsel is correct and implicitly has been approved by the United States Supreme Court. Therefore, law enforcement officers may be well advised to comply with *Miranda-Edwards* standards whenever a suspect is interrogated under the circumstances here.[2] Reliance on the majority's view of

[2] I would like to clarify that our advice was not followed by these officers and does not serve as part of the majority's opinion. The majority misinterprets *Miranda* and its progeny. It is true that the officers in this case gave *Miranda* warnings to the defendant before they interrogated him and after he invoked his fifth amendment right to counsel by requesting an attorney at his initial appearance. *Miranda*, however, stands for more than the prophylactic rule that requires law enforcement officers to inform defendants of their right to counsel. *Miranda* recognized the already existing fifth amendment right to have counsel present at custodial interrogations. The fifth amendment right to counsel, as interpreted in *Edwards*, requires that police-initiated interrogation cease with respect to any crime once the defendant has invoked that right. Accordingly, it was not enough for the police officers in this case to read the defendant his *Miranada* rights again. The fifth amendment requires that police-initiated interrogation must cease.

what constitutes a constitutionally antiseptic confession may result in the suppression of crucial evidence. It would appear to this writer to be prudent to follow *Espinoza* by assuming that defendants who request assistance of counsel at an initial appearance and remain in custody have thereby invoked their fifth amendment right to counsel, and police-initiated interrogation is thereafter prohibited in respect to any crime unless the suspect waives his right to counsel.

I respectfully dissent and would reverse the trial court's judgment of conviction.

I am authorized to state that Justice Shirley S. Abrahamson and Justice William A. Bablitch join in this dissent.

SUPREME COURT OF THE UNITED STATES

No. 90-5319

PAUL MCNEIL,

Petitioner

v.

WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 29, 1990

FILED
DEC 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5319

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PAUL MCNEIL,
Petitioner,

v.

WISCONSIN,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Was the petitioner Paul McNeil's acceptance of assistance of counsel and appearance with counsel at an initial appearance on a charged offense of armed and masked robbery an invocation of McNeil's Fifth Amendment right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide while the accused was in continuous custody?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-5319

PAUL MCNEIL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR PETITIONER

This Brief is respectfully submitted by the petitioner, Paul McNeil, who was convicted of second degree murder, armed burglary, and attempted first degree murder, all as party to a crime, in Racine, Wisconsin on March 19, 1988. McNeil seeks reversal of the judgment of the Wisconsin Supreme Court which affirmed these convictions.

OPINIONS BELOW

The Wisconsin Supreme Court on direct appeal affirmed the convictions of McNeil. *State of Wisconsin v. McNeil*, 155 Wis.2d 24 (1990); reprinted at J.A. 23.[1]

JURISDICTION

The judgment of the Wisconsin Supreme Court affirming the trial court conviction of McNeil was entered on May 2, 1990. Rehearing was not sought. Jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1257 (a).

[1] "J.A. ——" references are to pages in Joint Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States. These provisions are set forth in the Statutory Appendix to this Brief.

STATEMENT OF THE CASE

McNeil was convicted of second degree murder, attempted first degree murder, and armed burglary, all as party to a crime, on March 19, 1988. His conviction and sentence of 60 years was affirmed on May 2, 1990, by the Wisconsin Supreme Court (J.A. 41). A petition for certiorari was filed on July 30, 1990, and granted October 29, 1990.

STATEMENT OF FACTS

On May 18, 1987, Sergeant Robert Stauss of the Caledonia Police Department had in his own estimate sufficient information garnered from his own investigation and that of Detective Joseph Butts of the Milwaukee County Sheriff's Department implicating McNeil as a participant in a Town of Caledonia, County of Racine, Wisconsin homicide and requested a homicide complaint and warrant for McNeil's arrest (R 47-5, 7, 8).[2] Stauss had been informed on May 13, 1988, by the Milwaukee Police Department that McNeil was in custody in Omaha (R 47-12). The Omaha authorities knew that Stauss wanted to talk to McNeil and Lloyd Crowley (McNeil's eventual co-defendant in the homicide charge) (R 47-11).

Subsequently, Milwaukee County Deputy Sheriffs obtained custody of McNeil on May 20, 1987, in Omaha, Nebraska, where he was being held pursuant to a State of Wisconsin, County of Milwaukee arrest warrant for armed and masked robberies. On May 20, 1987, the deputies travelled to Omaha to escort McNeil back to Milwaukee after extradition proceedings had taken place in Omaha concerning the robberies. McNeil was to be transported back to Milwaukee County for an Initial Appearance on the robbery charges.

[2] "R——" references are to the Record as filed with the Wisconsin Supreme Court.

The Milwaukee County detectives, more particularly Detective David Smukowski, first contacted McNeil on May 20, 1987 (R 44-3, 4). At the time that Smukowski went to Omaha, he was aware that McNeil was possibly involved in a murder in Caledonia (R 44-5). Smukowski and his partner gave McNeil his Miranda warnings read from a standard County of Milwaukee Statement of Rights document (J.A. 5) (R 44-6, 9, 10). McNeil was asked if he wanted to talk to the deputies. McNeil said no and the deputy stopped the conversation. McNeil said nothing more than no (R 44-6).

The following day, May 21, 1987, Detective Smukowski again spoke to McNeil. Smukowski was aware that everyone in the Milwaukee County Division to which he was assigned knew that McNeil was a suspect in a homicide and armed robbery and was being brought back from Omaha (R 44-8). Stauss testified that "Milwaukee was well aware of what I was investigating." (R 47-12). Smukowski, while transporting McNeil to the airport, engaged him in conversation. He told McNeil that it would be to his advantage if he told about his involvement and the extent of his involvement in both the homicide case and the armed robbery cases. Smukowski indicated to McNeil that if he cooperated it might result in some consideration for McNeil in the future (R 44-6, 7, 8, 9). McNeil was taken out of the Omaha jail for 2-3 hours, accompanied by the deputies and Omaha detectives, and unsuccessfully sought the location of Crowley, who was the other suspect in the Caledonia homicide (R 44-13).

On May 21, 1987, McNeil was returned to Milwaukee. He was brought before a Judicial Court Commissioner on

May 22, 1987, in the morning hours, for an initial appearance on the robberies (R 53-16). When McNeil appeared before the Commissioner, he appeared with a public defender. Bail was set on the robberies and a preliminary examination was scheduled (R 31-1 thru 6) (J.A. 8-11).

At approximately 7:55 p.m. on May 22, 1987, Detective Butts of the Milwaukee County Sheriffs Department initiated a visit to McNeil's jail cell to interrogate him (R 40-10,12). Detective Butts was aware of the homicide in Caledonia from information received from Sergeant Stauss (R 40-29). Butts had been assisting the Caledonia Police in their investigation of the Caledonia homicide since late April, 1990 (R 40-29). Butts went to see McNeil in McNeil's cell for the purpose of talking to him about the armed robbery in Milwaukee and possibly the Caledonia homicide (R 40-12, 14, 29).

When Butts spoke with McNeil on May 22, 1987, he had knowledge that McNeil had not made statements to the Sheriffs returning McNeil from Omaha (R 40-49). Butts was not aware that earlier on May 22, 1987, McNeil had an attorney appointed to represent him on the armed robberies and had appeared with that attorney at an initial appearance (R 40-50).

Detective Butts advised McNeil of his Miranda Rights using the same type of form that Detective Smukowski had used in Omaha (J.A. 12) (R 40-11, 73). Butts questioned McNeil almost exclusively about the Caledonia homicide (R 40-14). McNeil gave an exculpatory statement (R 40-34). Butts did not believe McNeil's statement and told him that he would return to talk to him further (R 40-34). Butts returned with five other detectives and officers to interrogate McNeil on May 24, 1987 (R 40-37, 38, 39, 40). During the course of this interrogation, McNeil gave a statement which was partly exculpatory and partly inculpatory (R 40-37, 38). Still not

satisfied with McNeil's statement, Butts initiated a third interrogation of McNeil on May 26, 1987 (R 40-41) during which McNeil gave an inculpatory statement concerning the Caledonia homicide (R 40-42).

The interrogation of McNeil on May 24, 1987, lasted approximately five hours and took place in the presence of five to six detectives (R 40-38, 39, 40). The May 26, 1987, interrogation lasted approximately one and a half hours and was in the presence of at least five detectives (R 40-42).

The felony warrant request of Sergeant Stauss which was dated May 18, 1987, was date stamped received by the Racine District Attorney's Office on May 27, 1987 (R 47-17) (J.A. 4). On May 27, 1987, a complaint and warrant were issued for McNeil charging him with the Caledonia homicide (R 40-69) (J.A. 4).

McNeil was brought before a Racine County Magistrate on June 4, 1987, on charges which involved the Caledonia homicide (R 40-69). Various motions and hearings were held including motions to suppress the statements which had been made by McNeil in the Milwaukee County Jail and Milwaukee Sheriff's Detective Bureau. None of these motions involved the issue which is presently before this Court. After hearings and various negotiations, McNeil entered no contest pleas to amended charges of second degree murder, attempted first degree murder, and armed burglary all as party to a crime (R 51-20). At the plea hearing, McNeil was advised by the court that his confession was admissable and based on that ruling McNeil felt it was in his best interest to enter into the plea negotiation (R 51-24) (R 53-4, 14) (R 30-3). Subsequently motions were filed with the trial court including ineffective assistance of counsel for failure to raise the issue which is presently before this Court.

A hearing was held before the trial court involving the issue presently before this Court. After hearing argu-

ment and reading briefs, the trial court ruled against McNeil. The trial judge decided that even if he had been aware of the case law which had been raised at the post-conviction motions, *United States ex rel Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), *cert. denied*, 43 U.S. 1030 (1987), his decision would have been the same (J.A. 14, 15).

On direct appeal to the Wisconsin Supreme Court, McNeil argued that his statements while in custody in Milwaukee County were improperly received in evidence and that the conviction based on those statements should have been set aside. McNeil argued that when he appeared with counsel before the Judicial Court Commissioner on May 22, 1987, he had invoked his Fifth Amendment right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide while he remained in continuous custody. In rejecting McNeil's Fifth Amendment claim, the Wisconsin Supreme Court held:

> "Since there is no Sixth Amendment right to counsel on uncharged offenses, an invocation of that right at an initial appearance or arraignment on a charged offense does not bring the expanded scope of the Fifth Amendment *Edwards* rule into play with respect to interrogation on uncharged offenses." See *Moran v. Burbine*, 475 U.S. 412, 431 (1986); *Maine v. Moulton*, 474 U.S. 159, 180 n. 16 (1985); *McNeil, supra*, at 34 (J.A. 28).
>
> "We do not read *Butler* [110 S.Ct. 1212 (1990)] and *Roberson* as affecting a transmutation of the Sixth Amendment right to counsel into a Fifth Amendment right to counsel. We hold that a defendant does not invoke his or her Fifth Amendment right to council by invoking the Sixth Amendment right to counsel at an initial appearance." *McNeil, supra*, 36 (J.A. 30).

The Wisconsin Supreme Court did not consider the initial appearance to be a venue where McNeil was subject to custodial interrogation and therefore his Fifth Amendment rights were not appropriately invoked.

> "The Fifth Amendment right to counsel recognized in *Miranda* is not one that attends a criminal suspect under all circumstances and in every situation. Rather, it attaches only when an accused is in custody, *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980), and subject to custodial interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 198 (1980). An accused may well be in custody at an initial appearance but he is not being subjected to interrogation. Thus, there is no Fifth Amendment right to counsel at an initial appearance. When an accused invokes his Sixth Amendment right to counsel at that appearance, there is no basis for concluding that he is invoking his Fifth Amendment right to counsel." *McNeil, supra*, at 36 (J.A. 30).

The court rejected McNeil's reliance on language in *Michigan v. Jackson*, 475 U.S. 625 (1986) at 633-634 n.7 that a request for counsel at an initial appearance invokes the Fifth Amendment right to counsel. In rejecting McNeil's analysis, the Wisconsin Court found that:

> "The 'ordinary meaning' of a defendant's request for counsel at an initial appearance is only that he is invoking his Sixth Amendment right to counsel in the pending prosecution. When a defendant invokes his Sixth Amendment right to counsel on a pending prosecution by requesting or accepting counsel at the initial appearance, it need not be viewed as an invocation of the Fifth Amendment right precluding interrogation on unrelated crimes any more than a limited invocation of the Fifth Amendment right to counsel in *Barrett* needed to be viewed as an invocation of the full Fifth Amendment right." *McNeil, supra*, at 39 (J.A. 33).

In dissent, Chief Justice Nathan Heffernan found that the majority had misstated the issue. Rather than a

transmutation of a Sixth Amendment right to a Fifth Amendment right, the issue was whether McNeil had:

> "invoked his Fifth Amendment right to counsel when he requested assistance of counsel at an initial appearance instead of while being interrogated afterwards." *McNeil, supra,* at 48 (J.A. 41).

Concerned that the majority was misreading *Miranda,* Heffernan wrote:

> "Because the defendant is not being interrogated when he makes his request for an attorney, the majority leaps to the conclusion that there is no danger of compelled testimony, and, therefore, the Fifth Amendment right to counsel which arises from the protection against self-incrimination does not implicate it. The majority misreads the holdings of *Miranda v. Arizona, supra,* and *Edwards v. Arizona, supra.*" *McNeil, supra,* at 49 (J.A. 42).

The dissent rejected the majority view that the invocation of counsel must take place while a defendant is being interrogated.

> "It is apparent that there is danger of 'subtle compulsion' when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependent upon the subject matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated." *McNeil, supra,* at 50 (J.A. 43).

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court has misapplied numerous decisions of this Court construing the Fifth and Sixth Amendments which require reversal of McNeil's conviction. The Wisconsin majority held that McNeil who appeared with counsel at an initial appearance for armed and masked robberies had only invoked his Sixth Amendment right to counsel and had not invoked his Fifth Amendment right to counsel. Therefore any statement involving unrelated crimes obtained from McNeil during police initiated interrogation while he was in continuous custody was admissable. The Wisconsin ruling is contrary to the intent of Miranda and its progeny and disregards this Court's implied findings in previous cases that an accused who appears at arraignment or similar hearing with counsel has invoked his right to counsel pursuant to the Fifth Amendment.

The intent of *Miranda v. Arizona,* 384 U.S. 438 (1966), was to protect an accused from making self-incriminating statements unless the accused did so after waiving certain rights including the right to counsel. The waiver of an accused has to be made "voluntarily, knowingly and intelligently." *Miranda, supra,* at 444. Once in custody, the accused may invoke his right to counsel at "any stage of the process." *Miranda, supra,* at 444. Once the accused has invoked his right to counsel, all interrogation must cease until an attorney is present. *Miranda, supra,* at 474.

The accused can retain counsel or have counsel appointed. An accused can request counsel from a police officer, magistrate or judge. *Michigan v. Jackson,* 475 U.S. 625 (1986). When an accused makes a request, he does not know whether he is making a request pursuant to the Fifth Amendment or Sixth Amendment. *Jackson, supra,* at 633-634 n.7. "The settled approach to questions of waiver is to give a broad, rather than a narrow interpretation to a defendant's request for counsel." *Jack-*

son, supra, at 633; *Connecticut v. Barrett*, 479 U.S. 523, 529.

When McNeil was arrested by Milwaukee authorities in Nebraska for armed and masked robbery, he was given Miranda warnings and declined to make a statement. When asked the next day by the Milwaukee Sheriffs to cooperate and make a statement, understood by Detective Smukowski to concern either the armed robberies or homicide, McNeil declined. (R 44-7) Subsequently when McNeil accepted appointed counsel at an initial appearance, he spoke no words that he was invoking counsel only for Sixth Amendment purposes. Ignoring this sequence of events, the Wisconsin majority read the reasoning of *Jackson* and *Barrett* narrowly and incorrectly held that McNeil had not invoked his Fifth Amendment right to counsel.

Once an accused has invoked his right to counsel, police may not initiate interrogation. *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981). The accused may waive his previously invoked right to counsel by initiating interrogation with police and then voluntarily, knowingly, and intelligently waiving his Miranda rights. *Edwards, Id.* Unless the accused initiates such an interrogation, the police may not question him even on unrelated crimes. *Arizona v. Roberson*, 486 U.S. 675 (1987).

This Court has implied that when an accused retains counsel after a bond hearing that the accused has invoked his Fifth Amendment right to counsel thereby triggering the *Edwards* rule. *Wyrick v. Fields*, 459 U.S. 42 (1982). This Court has also implied that the request for appointed counsel at an arraignment triggers the *Roberson* rule. *Wolff v. United States, cert. granted*, 488 U.S. 807 (1988). The Court has implied that appearance with counsel at a bond hearing triggers the *Roberson* rule. *Butler v. McKellar*, 110 S. Ct. 1212 (1990).

The Wisconsin Supreme Court misapplied the broad interpretation required when a defendant requests counsel. *Jackson, supra,* at 633. Without citing authority,

the Wisconsin majority said the invocation of the Fifth Amendment right to counsel can only occur during interrogation. This rule is contrary to the intent and spirit of Miranda which requires an environment free from government "compulsion, subtle or otherwise." *Barrett, supra,* at 528. When an accused such as McNeil appears in court with counsel after being previously advised of his right to appointed counsel by police officers and is subsequently interrogated by police, the danger of subtle compulsion is present. *Barrett, supra,* at 528.

The rule proposed by McNeil is simple and concise. If an accused appears at an arraignment or similar hearing with counsel, absent a specific limitation by the accused, the invocation of counsel includes the Fifth Amendment right to counsel thereby triggering the rules of *Edwards, Jackson, Roberson.* The purpose of the bright line rules underlying these cases serves as an appropriate basis for a bright line rule being applied to McNeil.

ARGUMENT

I. THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE McNEIL'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

Miranda and its progeny, imposed "prophylactic standards . . . to safeguard the Fifth Amendment privilege against self-incrimination." *Michigan v. Harvey*, 110 S. Ct. 1176 (1990). The Court in Miranda: ". . . concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda, supra,* at 467. One of

the rights mandated by Miranda was the "right to the presence of an attorney, either retained or appointed." *Miranda, supra,* at 444. "If, however, he [defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda, supra,* at 445.

The series of incriminating statements obtained from McNeil by Detective Butts and his associates were contrary to the mandates of Miranda and its progeny. Within hours after McNeil invoked his right to counsel and appeared with counsel at an initial appearance on May 22, 1987, Detective Butts initiated an interrogation of McNeil in his cell at the Milwaukee County Jail. Not satisfied with the statement he received on May 22, 1987, Butts initiated further reinterrogations of McNeil in police dominated atmospheres which resulted in self-incriminating statements. All of these interrogations took place in atmospheres which generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda, supra,* at 467; *Illinois v. Perkins,* 110 S. Ct. 2394, 2397 (1990). The Wisconsin Supreme Court's decision allowing police initiated interrogation of McNeil while he was in continuous custody, after McNeil's invocation of his right to counsel and his appearance with counsel at an initial appearance is in conflict with applicable decisions of this Court.

A. The Wisconsin Supreme Court's Ruling Rests on an Erroneous Reading of *Michigan v. Jackson*

The Wisconsin Supreme Court held that a defendant "does not invoke his or her Fifth Amendment right to counsel by invoking the Sixth Amendment right to counsel at an initial appearance." *McNeil, supra,* at 36 (J.A. 30). The court based this finding on its understanding that if an accused is not being subjected to interrogation then the accused cannot invoke his or her Fifth Amendment right to counsel. *McNeil, supra,* at 36 (J.A. 30).[3] In reaching its conclusion, the Wisconsin Supreme Court distorted the plain meaning of language in *Jackson* ("doubts must be resolved in favor of protecting the constitutional claim . . ." *Jackson, supra,* at 632), and misread the rule of *Connecticut v. Barrett,* 479 U.S. 523, 528 (1987), which reaffirmed the *Jackson* language on invocation of counsel.

The Wisconsin Court accepted the language in *Jackson* that analyzed two sources for the right of counsel at post arraignment, custodial interrogations. *McNeil, supra,* at 32, 33 (J.A. 23, 28). The Wisconsin Court concluded that the "ordinary meaning", (*Barrett, supra,* at 529-530), of a defendant's request for counsel at an initial appearance is that he is only invoking his Sixth Amendment right to counsel in the pending prosecution. *McNeil, supra,* at 39-40 (J.A. 33).[4] The Wisconsin Court was certain that a defendant who had appeared with counsel at an initial appearance would not suffer from "subtle compulsion" if later he were to be interrogated by police while in custody after being provided with Miranda warnings, including the right to counsel. *McNeil, supra,* at 37 (J.A. 31). This analysis is contrary to the reasoning and language in both *Jackson* and *Barrett.*

The record of McNeil's appearance at his initial appearance is devoid of any speech on McNeil's part other

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[3] It can be presumed that if the Wisconsin Court ruled that McNeil had invoked his Fifth Amendment right to counsel by appearing with counsel at his initial appearance that the Wisconsin Court would have felt compelled by *Arizona v. Roberson, supra,* at 675, 685 (1988) to reverse the trial court's ruling. *McNeil, supra,* at 34, 35, 36 (J.A. 29, 30).

[4] The Wisconsin Court's concept of the "ordinary meaning" of a defendants invocation of counsel at an arraignment or initial appearance is not so obvious. State and Federal Courts have adopted divergent rules on this very issue and serve as one of the basis of McNeil's Petition for Writ of Certiorari which was granted in this case on July 30, 1990.

than McNeil's acknowledgment of penalties for armed and masked robbery (R 31-6) (J.A. 8-11). The Wisconsin Supreme Court's only reference to the initial appearance record were that bail was set, a preliminary examination was scheduled, and the court made the further observation that McNeil "had an attorney with him" at the initial appearance. *McNeil*, *supra*, at page 31 (J.A. 26). The Wisconsin Supreme Court found nevertheless that: (1) McNeil did not want his counsel to assist him with custodial interrogations as opposed to adversary proceedings, and, (2) that McNeil was not concerned with having assistance of counsel for interrogations dealing with charges other than the armed and masked robberies. *McNeil*, *supra*, at 36, 37, 39, 40 (J.A. 30-34). These findings of the Wisconsin Supreme Court distort the language of *Barrett* that interpretation of a defendant's request for counsel is only required where the defendant's words understood as ordinary people would understand them, are ambiguous. *Barrett*, *supra*, at 529. In *Barrett* the accused explicitly limited his invocation of counsel (he did not want to put anything in writing until his attorney came). *Barrett*, *supra*, at 526. At best, McNeil's near silence at the initial appearance is ambiguous and requires the standard applied by the Court in *Barrett*! "We do not denigrate the 'settled approach to questions of waiver [that] requires us to give a broad, rather than a narrow interpretation to a defendant's request for counsel,'" *Barrett*, *supra*, at 529 citing *Jackson*, *supra*, at 625, 633.

In *Jackson* this Court addressed similar arguments from the petitioner, the State of Michigan. The Court rejected Michigan's reliance "on the factual differences between a request for counsel during custodial interrogation and a request for counsel at an arraignment." *Jackson*, *supra*, at 640. Michigan was asking the Court to find that absent a specific statement by an accused that he needs counsel for custodial interrogation separate from his request for counsel at an arraignment, the court could

not find an invocation of counsel for purposes of protection against self-incrimination during in-custody interrogation. The Court was not persuaded:

> "The State maintains that respondents may not have actually intended their request for counsel to encompass representation during any further questioning by the police. This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago, in *Johnson v. Zerbst*, 304 U.S. 458, 146 A.L.R. 357 (1938) a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the court explained that we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' *Id.* at 464, 146 A.L.R. 357. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer v. Williams*, 430 U.S. at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyers services at every critical stage of the prosecution.[6] We thus reject the state's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.[7]" *Jackson*, *supra*, at 633 (footnotes omitted).

Footnote seven in the above quotation was an endorsement of the Michigan Supreme Court's reasoning concerning the nature of an accused's request for counsel. Though the Michigan court ruled that Jackson had not invoked his Fifth Amendment right to counsel at his arraignment, this Court endorsed the Michigan Court's analysis of an accused's request for counsel including stages of the proceedings where interrogation is not taking place:

> "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth

and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries single handedly." *Jackson, supra,* at 633-634 n.7.

The Court's reasoning in *Jackson* applies to McNeil. McNeil made no statements on the record at his initial appearance that he was limiting his invocation of counsel to the Sixth Amendment. McNeil had previously been advised by deputy sheriffs of his rights and chose to remain silent. He had been further advised by deputy sheriffs to cooperate by telling his side of the story concerning the armed and masked robberies and the homicide, but remained silent. However, his presence with counsel at his initial appearance was a clear indication that he felt that he did "not believe that he [was] sufficiently capable of dealing with his adversaries single handedly."[5]

[5] *Jackson, supra,* at 634 n.7, indicates again this Court's perception of the crucial function of counsel at interrogation. "The rule in Miranda . . . was based on this court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of the special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the court found that 'the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system' established by the court . . . the per se aspect of Miranda was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Fare v. Michael C.,* 442 U.S. 702, 719 (1979) (Cites omitted); also, *Minnick v. Mississippi,* (89-6332) p. 7 (December 3, 1990), "When counsel is requested, interrogation must cease and officials may not reinstate interrogation without counsel present . . ."

The Wisconsin Court's analysis would not allow a police initiated interrogation of McNeil concerning the armed and masked robbery charges after his initial appearance. However, the Wisconsin Court refused to prevent such interrogations of McNeil on unrelated charges while he was in continuous custody after his initial appearance with counsel. The Wisconsin holding rests on the conclusion that McNeil did not want assistance from his counsel involving crimes for which he had not yet been charged. This conclusion flows from a faulty analy-

In *Patterson v. Illinois,* 487 U.S. 285 (1988), the Court addressed Sixth Amendment waivers using Fifth Amendment criteria. As part of its analysis, the Court viewed the waiver question as one of analyzing what the purpose of a lawyer could serve at a particular stage of the proceedings in the Sixth Amendment context. Analyzing the function of counsel was a method of describing whether the accused's waiver of counsel was an intentional "relinquishment or abandonment of a known right or privilege." *Patterson, supra,* at 292 citing *Johnson v. Zerbst, supra,* at 464, 58 S.Ct. at 1023. In the Fifth Amendment context, this Court has held that "we described this requirement as a 'full awareness [of] both the nature and of the right being abandoned and the consequences of the decision to abandon it.'" *Patterson, supra,* at 292, *Moran v. Burbine,* 475 U.S. 412, 421 (1986). This same functional analysis can be applied to the instance of McNeil appearing with counsel at his initial appearance. If McNeil had requested counsel in Nebraska the officers would no longer have the privilege to initiate interrogation of McNeil. McNeil's request for counsel before a magistrate does not lessen the critical function of counsel as outlined by this Court at an interrogation that takes place after the initial appearance while McNeil remains in custody.

sis that the language in *Jackson*, *supra*, at 633-634 n.7, applies only to the Sixth Amendment.[6]

The Wisconsin Court found that McNeil was invoking only his Sixth Amendment right to counsel and therefore he could not have been invoking his right to have counsel present when he was interrogated by police on unrelated charges. By refusing to acknowledge the reasoning in *Jackson* that lawyers and judges may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel but that average persons do not, the Wisconsin Court was able to ignore the rule of *Roberson* ["We do not read *Butler* and *Roberson* as affecting a transmutation of the Sixth Amendment right to counsel into a Fifth Amendment right to counsel," *McNeil*, *supra*, at 36 (J.A. 30)]. The *Roberson* decision, however, took into account the subjective state of an accused. In *Roberson* this Court stated:

> "Roberson's unwillingness to answer any questions without the advise of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation; unless he otherwise states, see

[6] Contra: "Many persons in custody today will invoke the Miranda right to counsel during the first interrogation, so that the permanent prohibition will attach at once. Those who do not do so will almost certainly request or obtain counsel at arraignment. We have held that a general request for counsel, after the Sixth Amendment right has attached, also triggers the *Edwards* prohibition of police-solicited confessions, see *Michigan v. Jackson*, 475 U.S. 625 (1986), and I presume that the perpetuality of prohibition announced in today's opinion applies in that context as well . . . This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime but to those involving other subjects as well. See *Arizona v. Roberson*, 486 U.S. 675 (1988)." *Minnick v. Mississippi*, *supra*, at p. 8 (Scalia, J., dissenting).

> *Connecticut v. Barrett*, there is no reason to assume that a suspect's state of mind is in any way investigation-specific, see *Colorado v. Spring*, [479 U.S. 564; 107 S.Ct. 851; 93 L.Ed.2d 954 (1987)]." *Roberson*, *supra*, at 684.

The reasoning in *Roberson* and *Jackson* supports McNeil's claim that when he appeared with counsel at an initial appearance he was no more investigation-specific than *Roberson*. Testimony of Detective Smukowski indicates that when Smukowski was in Nebraska both he and McNeil knew that the murder case was being discussed when Smukowski encouraged McNeil to tell his side of the story (R 44-6, 7, 8). Having been initially advised of Miranda, McNeil refused to talk. After his refusal to talk, he was advised by police that it was in his interest to discuss all matters including the homicide, but McNeil refused to do so. This sequence of events together with McNeil's continual in-custody status, combined with his acceptance and appearance with counsel at an initial appearance resulted in McNeil being subjected to exactly the type of "subtle compulsion" that the Supreme Court of Wisconsin denied could exist when McNeil was interrogated the evening of May 22, 1987. *McNeil*, *supra*, at 37 (J.A. 31). By asserting his right to counsel and appearing with counsel at an initial appearance, McNeil indicated that he did not believe that he was sufficiently capable of dealing with his adversaries single handedly. As Justice Heffernan wrote in dissent:

> "It is apparent that there is danger of 'subtle compulsion', when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependent upon the subject

matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated." *McNeil*, *supra*, at 50 (J.A. 43).

B. This Court's Decision in *Arizona v. Roberson* Mandates Reversal

The decision of the Wisconsin Supreme Court which affirmed McNeil's conviction is contrary to a series of decisions by this Court which are "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Michigan v. Harvey*, *supra*, at 1180. The Wisconsin Court was unpersuaded that *Edwards v. Arizona*, *supra*, *Arizona v. Roberson*, *supra*, and *Butler v. McKellar*, 110 S. Ct. 1212 (1990), helped resolve the issue before this Court.

In *Edwards*, *supra*, at 477, 484, 485, this Court reasoned that Miranda "indicated that assertion of the right to counsel was a significant event" and that the assertion calls for additional safeguards. ". . . when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights." *Edwards*, *supra*, at 484. The Court further held that an accused ". . . having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with police." *Edwards*, *supra*, at 484-485. The court emphasized: "It is inconsistent with Miranda and its progeny for the authorities at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards* at 485. "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois*, 469 U.S. 91, 98 (1984), citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

The concept enunciated in *Edwards* was applied by this court to sequential police interrogations involving separate offenses. *Arizona v. Roberson*, *supra*.[7] In *Roberson*, the defendant was arrested for burglary and given Miranda warnings. Subsequently, defendant was arrested for burglary and given Miranda warnings. Subsequently, defendant stated he wanted a lawyer before answering any questions. Three days later, while the defendant was still in custody, a second police officer interrogated the suspect about a previous burglary for which the defendant had not been in custody. The second officer was not aware that the defendant had earlier requested counsel. The second officer advised the defendant of his Miranda rights and obtained an incriminating statement concerning the previous burglary.

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[7] Explaining the purpose of *Edwards*, this Court stated:

"[T]he prophylactic protections that the *Miranda* warnings provide to counter act the 'inherently compelling pressures' of custodial interrogation and to 'permit a full opportunity to exercise the privilege against self-incrimination,' 384 U.S. at 467, 86 S.Ct. at 1624, are implemented by the application of the *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspects own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice White has explained, 'the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the

Roberson held that the trial court properly suppressed the statement. This Court was not satisfied that because Roberson was being questioned about an unrelated offense that his statement should be admitted into evidence. *Roberson, supra.*[8] "As a matter of law, the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Roberson, supra,* at 683.

The Court in *Roberson* granted certiorari to "resolve a conflict with certain other state court decisions," on the separate investigation issue. *Roberson, supra,* at 679 n.3. One of the cases cited in n.3 was *U.S. ex rel Espinoza v. Fairman, supra.* The Court stated that the Seventh Circuit had the same rule as the Arizona Supreme Court decision which was affirmed by this Court in *Roberson.*[9]

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authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.'" (*Michigan v. Mosley,* 423 U.S. 96, 110, n.2), *Roberson, supra,* at 681.

[8] In *Roberson* the Court rejected petitioner's urging based on *Maine v. Moulton,* 474 U.S. 159 (investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to assistance of counsel) that in the "Fifth Amendment context 'statements about different offenses developed at different times, by different investigators, in the course of two wholly independent investigations, should not be treated the same.'" Brief for Petitioner 32. This argument overlooks the differences between the Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination. The former arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a State apparatus that has been geared up to prosecute him. The latter is protected by the prophylaxis of having an attorney present to counter-act the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." *Roberson, supra,* at 685.

[9] The *Espinoza* case is very similar factually to the facts in McNeil. In *Espinoza* the police had arrested a suspect on a weapons

The *Roberson* decision had an impact on Federal Circuit cases similar to the fact situations developed in *Espinoza* and *McNeil.* In *United States v. Wolff,* 879 F.2d 1320 (6th Cir. 1989), the defendant Wolff had been arrested for theft and possession of forged instruments. Wolff was appointed counsel at arraignment. Subsequently, while in custody, Wolff was interrogated by gov-

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charge, and after investigating the weapon that Espinoza had in his possession, came to a conclusion that he had committed a murder. Espinoza was subsequently arraigned on that weapons charge where he was represented by counsel. After the arraignment, Espinoza remained in continuous police custody. Subsequently the police initiated an interrogation concerning the murder. During that interrogation, Espinoza was not represented by counsel, waived his Miranada rights, and confessed to the murder. At his trial, Espinoza moved to have the murder confession suppressed. The trial court denied his motion and he was convicted of murder.

Espinoza exhausted state remedies and then petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. The petition was granted finding that Espinoza had a Fifth Amendment and Sixth Amendment right to have counsel at the interrogation concerning the homicide, and that he had not knowingly and voluntarily waived those rights. The Seventh Circuit Court of Appeals found that the statements of Espinoza should have been suppressed pursuant only to the Fifth Amendment.

In the instant case, McNeil was returned from Omaha to Wisconsin for an armed and masked robbery. Investigating officers had already focused upon McNeil as a prime suspect in a murder case based on information from three witnesses. When McNeil was brought in custody to Milwaukee, the police already had information from these persons implicating McNeil (R 47-7 thru 11). Apparently not satisfied that they would be able to obtain a conviction based on the testimony of these witnesses, the officers spent the next week interrogating McNeil, disregarding his invocation of rights which had taken place at his initial appearance, more particularly his invocation of his right to counsel under the Fifth Amendment. The subsequent police initiated interrogations of McNeil were not a happenstance resulting from casual conversation between an inmate and an officer. The interrogations were an organized, planned, and well implemented systematic approach to breaking down an individual's ability to withstand structured coercion. It worked.

ernment agents and she confessed to involvement in a murder conspiracy. The Sixth Circuit initially ruled the confession admissible in an unpublished order affirming Wolff's conviction.

Wolff filed a Petition for Writ of Certiorari which this Court granted vacating the Sixth Circuit unpublished order and remanding the matter to the Sixth Circuit for further consideration in light of this Court's decision in *Roberson*. *Wolff v. United States*, *cert. granted* 488 U.S. 807 (1988). After the Sixth Circuit received the October 3, 1988, order from this Court, it reversed its earlier decision and approved the *Espinoza* holding that the invocation of "right to counsel at arraignment triggers *Edwards*" and the "prophylactic rule of *Roberson*." *Wolff*, *supra*, at 1323.

Just as Wolff was appointed an attorney at her arraignment, McNeil was appointed an attorney at his initial appearance. Just as Wolff was returned to the jail where she had spent the previous night and later that day was interviewed while still in custody, McNeil after his initial appearance was returned to the jail where he had spent the previous night and was visited a few hours later by Detective Butts and interrogated. Like Wolff, McNeil was advised of his Miranda rights and signed a form stating that he understood and wished to waive those rights. The Sixth Circuit felt compelled to find pursuant to this Court's remand and its own understanding of *Roberson*, that on the facts of the case before them *Roberson* was violated. *Wolff*, *supra*, at 1322 (Absence of evidence indicating that *Wolff* intended to limit her invocation of counsel to the Sixth Amendment, therefore any doubts resolved to protect her constitutional claim, citing *Jackson*, *supra*, at 633).

The *Roberson* decision also had an immediate impact in the Fourth Circuit. In *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988), Butler like McNeil had been arrested on an unrelated charge and placed in the Charleston County

Jail. Butler retained local counsel who appeared with him at a bond hearing on the assault and battery charge. Unable to make bond, he was returned to custody in the county jail. He was subsequently questioned and confessed to an unrelated homicide. In the first *Butler* hearing which involved the issue which is presently before this Court, but was held prior to the *Roberson* decision, the Fourth Circuit disapproved and rejected the *Espinoza* decision. *Butler v. Aiken*, *supra*, at 255, 258. Subsequently, on motion for reconsideration, the Fourth Circuit took note that the *Roberson* decision had been decided on the same date as its earlier decision which rejected *Espinoza*. In its second *Butler* decision, *Butler v. Aiken*, 864 F.2d at 24 (4th Cir. 1988) the Court of Appeals responded to the State of South Carolina's attempt to distinguish *Roberson*. The court stated:

> "As an initial matter, we reject respondent's effort to distinguish *Roberson* factually. *We assume for purposes of decision that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights.* The subsequent interrogation concerning the Lane murder occuring during continuous custody, was contrary to the *Edwards* rule as modified in *Roberson*. If this case were before us on direct appeal, we would in all likelihood, be compelled to reverse the conviction and remand for a new trial." *Butler v. Aiken*, 864 F.2d at 25 (emphasis added).[10]

The Wisconsin Supreme Court held that *Butler* and *Roberson* do not affect "a transmutation of the Sixth Amendment right to counsel into a Fifth Amendment

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[10] In *Butler v. McKellar*, 110 S.Ct. 1212 (1990), this Court implied that absent the retroactivity issued, if Butler had been questioned post *Roberson*, the outcome may have been different. "The interrogation of Butler, while unquestionably contrary to present 'guidelines' was conducted in strict accordance with established law at the time." *Butler*, *supra*, at 1216.

right to counsel." *McNeil, supra,* at 36 (J.A. 30). The Wisconsin Court's statement ignores the stated purpose for this Court granting certiorari in *Roberson* and the implications of the *Wolff* and *Butler* decisions.

1. *The Wisconsin Supreme Court Ruling Is Contrary to This Court's Findings of When an Accused Has Invoked His Right to Counsel Pursuant to the* Miranda, Edwards, Roberson *Line of Cases*

The Wisconsin Supreme Court has made much of the view that McNeil was not being interrogated when he made his appearance with counsel at the initial appearance and therefore was not invoking his right to counsel pursuant to the Fifth Amendment. The Court in *Miranda* held that if a suspect "indicates in any manner at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda, supra,* at 444-45. The process of invoking Fifth Amendment rights by asserting the need for or appearing with counsel at an initial appearance or retaining counsel prior to interrogation has been recognized implicitly by this Court in cases involving the application of the *Edwards-Roberson* rule.[11]

Wyrick v. Fields, 459 U.S. 42 (1982), involved a soldier charged with raping an 81 year old woman. Fields was charged with the crime and after his arrest was released on his own recognizance. He retained private defense counsel. After discussing the matter with his counsel and a military attorney provided him by the Army, Fields requested a polygraph examination. He was subsequently examined after signing Miranda waivers. Subsequent to the examination, Fields admitted to having intercourse with the victim, and the statements that he made were utilized at trial. The Court of Appeals Eighth Circuit found that the police conduct in question contravened the clear import of this Court's decision in *Edwards*: "A defendant's right to have counsel present at custodial interrogations must be jealously guarded." *Fields, supra,* at 45.

This Court reversed the Court of Appeals. "In *Edwards,* this Court has held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided and unless the suspect himself initiates dialog with the authorities." *Fields, supra,* at 45. This Court agreed with the lower court that Fields initiated the interrogation. *Fields, supra,* at 218. Implicit in this finding was that Fields had invoked his right to counsel by retaining counsel. If Fields had not invoked his right to counsel, a Fifth Amendment waiver analysis "including the fact that the suspect initiated the questioning" would not have been necessary. *Fields, supra,* at 48.[12]

The Wisconsin Supreme Court erroneously cited *Butler v. McKellar, supra,* for the proposition that invocation of the Fifth Amendment right to counsel cannot take place at an arraignment or initial hearing. The Wisconsin majority found that "the facts in *McKellar* indicate that 'unlike McNeil, Butler invoked his Fifth Amendment right to counsel upon arrest on an unrelated assault and battery charge' and then retained counsel." *McNeil, supra,* at 35 (J.A. 29). The Wisconsin Court is wrong. The critical facts in *Butler* are similar to the facts in *McNeil.* ante p. 2-5. (Both Butler and McNeil

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[11] Petitioner has not found cases where this Court has explicitly ruled on the issue of invocation of counsel at arraignment or initial appearance for Fifth Amendment purposes. The cases cited are those where this Court has made an implied finding that retaining or appearing with counsel at an initial appearance or arraignment invokes Fifth Amendment rights pursuant to Miranda.

[12] In *Fields* this Court did not address Sixth Amendment right to counsel issues. The Sixth Amendment issues were not before the Court. *Fields, supra,* at 49. There was no indication that when Fields retained counsel he was being interrogated or was about to be interrogated.

were arrested for crime A; appeared with counsel to set bond; remained in custody, and were questioned without counsel being present about crime B.) There are some differences: 1) When Butler was arrested, he was given his Miranda rights which he waived and made a statement concerning the arrest for assault and battery with intent to kill (see *Butler v. McKellar*, *supra*, 86-6677, Joint Appendix p. 5) whereas McNeil refused to make a statement when given an opportunity in Omaha by Milwaukee County Deputy Sheriffs: 2) When Butler appeared at his bond hearing on assault and battery charges, he appeared with retained counsel whereas when McNeil appeared at his bond hearing he appeared with appointed counsel. Both men were interrogated more than once while in continuous custody by police officers who initiated visits to McNeil and Butler.

This Court wrote that Butler after invoking his Fifth Amendment right to counsel retained counsel who appeared with him at a bond hearing on August 31, 1980. *Butler*, *supra*, at 1214. Subsequently, Butler was returned to the County Jail where he was interrogated on an unrelated matter which resulted in a homicide and kidnapping charge. The Court did state though that the interrogation of Butler would be unquestionably contrary to "present guidelines", *Butler*, *supra*, at 1216, which is consistent with this Court's remand in the *Wolff* case, ante, p. 24.

The language of this Court stating that Butler appeared with retained counsel after invoking his Fifth Amendment right to counsel can be read to imply that Butler informed police officers prior to counsel's appearance at the bond hearing that Butler did not wish to proceed with interrogation without counsel present. The Joint Appendix in the *Butler* case reveals no evidence to warrant that conclusion. (See *Butler v. McKellar*, *supra*, J.A. p. 5 wherein the recorded testimony shows that the investigating officer testified that he took a statement

from Butler prior to the bond hearing after advising Butler of his Miranda rights. There is no testimony that Butler invoked his right to counsel at that time or at any other time prior to his appearance with counsel at the bond hearing). Presuming that this Court relied on the record as it appears in the *Butler* Joint Appendix, the inference is that Butler's appearance with retained counsel at a bond hearing was his only invocation of his Fifth Amendment right to counsel. Such an inference is consistent with the Fourth Circuit assumption that Butler's appearance with counsel was a conclusive demonstration of Butler's invocation of Fifth Amendment rights. *Butler v. Aiken*, ante, p. 25.

The implied finding that the right to Fifth Amendment counsel was invoked by Butler when he appeared with counsel at a bond hearing is consistent with one of the purposes of *Miranda-Edwards*: ". . . once an individual in custody invokes his right to counsel, interrogation must cease until an attorney is present' . . ." *Minnick*, *supra*, at p. 3. The Wisconsin majority rule that absence of interrogation at the initial hearing removes a requirement empowering an accused to invoke his Fifth Amendment right to counsel disregards the significance of the assertion and the need for "additional safeguards." *Jackson*, *supra*, at 636. "Nowhere does *Edwards* or any of its progeny indicate accuseds must assert their *Miranda* right to counsel while they are being interrogated. The request must be made while the defendant is in custody, prior to, or during, an interrogation.' *McNeil*, *supra*, at 50 (Heffernan, C.J., dissenting) (J.A. 42, 43).[13]

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[13] *Smith v. Illinois*, 469 U.S. 91 (1984), gives some guidance as to the principle from Miranda underlying the significance of timing when the assertion for counsel is made. When detectives informed the defendant that he had a right to his counsel's presence at the interrogation, the accused responded "Uh, yeah. I'd like to do that." *Smith*, *supra*, at 93. Ignoring this request, the detective in question continued advising Smith of his Miranda rights. Smith eventually made incriminating statements which were utilized by

2. *The Bright Line Character of* Edwards-Roberson *Has Provided Clear and Enforceable Guidance for Law Enforcement Officials and Should Apply to an Accused Who Asserts His Right to Counsel or Appears With Counsel at an Initial Appearance or Similar Hearing*

This Court has approved the utilization of bright line rules to protect Fifth Amendment rights:

> "We have repeatedly emphasized the virtues of a bright line rule in cases following *Edwards* as well as *Miranda*. See *Michigan v. Jackson*, *supra*; *Smith v. Illinois*, *supra* . . . we explained that the 'relatively rigid requirement that interrogation must cease upon the accused's request for an attorney. . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation and of informing court's under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity which benefits the accused and the state alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence, even though the confession might be voluntary under traditional Fifth Amendment analysis.'" *Roberson*, *supra*, at 681 (Cites omitted) (Footnote omitted).

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the State. This Court, in reversing the Illinois Supreme Court, reaffirmed that when an accused indicates "in any manner at any stage of the process that he wishes to consult with an attorney before speaking, the accused is not subject to further interrogation by the authorities." *Smith*, *supra*, at 95. The majority took note of the assertion that common sense suggests that the "police should both complete reading petitioner's rights and then ask him to state clearly what he elects to do, even if he indicated a tentative desire while he was being informed of his rights." *Smith*, *supra*, at 104 (Rehnquist, J., dissenting). The majority found such reasoning as "plainly wrong." A request for counsel coming "at any stage of the process" requires that questioning cease until counsel has been provided. *Smith*, *supra*, at 98.

In *Roberson*, the court approved again the bright line character of the *Edwards* rule that ". . . serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (Cites omitted) *Roberson*, *supra*, at 682.

In deciding *Roberson* the Court denied the petitioner's contention that the "bright line, prophylactic *Edwards* rule should not apply when the police initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation." *Roberson*, *supra*, at 682. One of the bases for the bright line rules is the "supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Harvey*, *supra*, at 1180.[14] "In the absence of such a bright line prohibition [the *Edwards* rule] the authorities through "badger[ing] or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself not withstanding his earlier request for counsel's assistance." *Smith*, *supra*, at 98.

The Wisconsin majority has devised their own bright line rule disregarding this Court's admonition that average persons when invoking their right to counsel do not "understand and appreciate the subtle distinction between

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[14] In *Harvey*, *supra*, this Court explaining the *Jackson* bright line waiver rule wrote:

> ". . . the protective rule we created in *Jackson* [is] based on the apparent inconsistency between a request for counsel and a later voluntary decision to proceed without assistance." *Harvey*, *supra*, at 1181 (cites omitted).

Fifth and Sixth Amendment rights to counsel." *Jackson*, *supra*, at 633-634 n.7. Disregarding *Zerbst*, *supra*, and *Moran v. Burbine*, 475 U.S. 412 (1986) ("A full awareness [of] both the nature of the right being abandoned and the consequences of the decision to abandon it") *Moran*, *supra*, at 421, the Wisconsin rule does not allow for a hearing to determine the totality of facts and circumstances of the case when the accused invokes his right to counsel at the initial appearance. ("We hold that a defendant does not invoke his or her Fifth Amendment right to counsel by invoking the Sixth Amendment right to counsel at an initial appearance.") *McNeil*, *supra*, at 36 (J.A. 30). The Wisconsin majority disregards the reality faced by an accused. Surely, an accused who feels the necessity to shield himself from the police and seek the protection of counsel as a "medium between himself and the State", *Maine v. Moulton*, 474 U.S. 159, 176 (1985) concerning an armed and masked robbery seeks the same shield of counsel concerning a homicide investigation.

The absence of the bright line rule advocated by McNeil concerning the issue before the Court will result in additional hearings which will burden courts with lengthy examinations of defendants who will insist they intended to invoke their Fifth Amendment right to counsel at an initial appearance. Numerous post conviction hearings with counsel defending themselves from an onslaught of ineffective claims will result. Courts will have to determine if counsel advised clients to invoke their Fifth Amendment right to counsel at the initial appearance or informed magistrates that clients were invoking Fifth Amendment right to counsel.

The bright line rule being urged on the Court by McNeil is concise. A defendant who at an initial appearance or similar proceeding requests counsel or appears with counsel may not be questioned by police while he remains in continuous custody unless the defendant himself initiates interrogation. This affords the defendant the same rights that exist for an accused who, prior to his appearance at an initial appearance or similar hearing invokes his right to counsel. It also ". . . has the virtue of providing police and prosecutors with specificity as to what they may do in conducting custodial interrogations, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Roberson*, *supra*, at 681. Such a rule would further the *Edwards* policy of ". . . conserv[ing] judicial resources which would otherwise be expended making difficult determinations of voluntariness, and implement[ing] the protection of Miranda in practical and straightforward terms." *Minnick*, *supra*, p. 4. Such a rule would have the merit of ". . . clarity of . . . command and . . . certainly of its application." *Minnick*, *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court affirming McNeil's conviction should be reversed.

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STATUTORY APPENDIX

STATUTORY APPENDIX

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

No. 90-5319

JAN 10 1991
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Paul McNeil,
Petitioner,

v.

Wisconsin,
Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF RESPONDENT

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No. 90-5319

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Paul McNeil,
Petitioner,

v.

Wisconsin,
Respondent.

On Writ of Certiorari to the
Supreme Court of Wisconsin

BRIEF OF RESPONDENT

SUPPLEMENTARY STATEMENT OF THE CASE

The statement of the case provided by the petitioner (hereinafter "the defendant") is generally accurate and complete. The respondent (hereinafter "the state") has only two modest additions to it, relating to the circumstances surrounding Milwaukee County Detective Butts' initiation of discussion

with the defendant about the Racine County offenses at issue in this case after the defendant had appeared with counsel at his initial hearing on Milwaukee County charges.

First, Detective Butts initiated that discussion, at least in part, because the defendant had indicated, prior to his court appearance on the Milwaukee County charges, that he wanted to talk to him. Prior to the defendant's return from Omaha, Nebraska, Butts had had a conversation with the defendant's girlfriend (R. 43:8). The defendant's girlfriend had informed him that the defendant would not be fighting extradition, and that "he wanted to talk to [Butts] when he got back to Milwaukee" (R. 43:9).

Second, when he approached the defendant on the evening of May 22, 1987, after the defendant's appearance with counsel earlier that day at the initial hearing on the Milwaukee County charges, Detective Butts intended "to talk to him about the armed robbery in Milwaukee County" and "possibly the Caledonia [Racine County] homicide also" (R. 40:14). But he "never got a chance to get into the [Milwaukee County] robbery" (*id.*). After he read the defendant his *Miranda* rights and the defendant signed the waiver of them, the defendant "said I guess you want to talk to me about this thing in [Racine County]" (*id.*). Butts replied that he did and "at that point [the defendant] started telling [Butts] exactly what transpired at that particular time" (*id.*).

SUMMARY OF ARGUMENT

At issue here is the admissibility of the defendant's statements about his participation in the crimes charged in this Racine County prosecution, which were made during police-initiated interrogation after his appearance with counsel at an initial hearing on unrelated charges in Milwaukee County. The defendant contends those admissions were

obtained in violation of the rule this Court created in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), hereinafter "the *Edwards* rule," which bars police-initiated interrogation after a defendant invokes his right to counsel during custodial interrogation.

In considering the defendant's contention, it is necessary to recognize that two distinct rights to counsel potentially come into play when a defendant is interrogated by the police: the **Fifth Amendment** right recognized in *Miranda v. Arizona*, 384 U.S. 436, 470-71 (1966), which applies whenever a criminal suspect is subjected to custodial interrogation; and the **Sixth Amendment** right directly conferred by the Constitution, which precludes the police from deliberately eliciting statements from the defendant in counsel's absence after the formal initiation of a criminal prosecution.

Although the *Edwards* rule applies in both the Fifth Amendment and Sixth Amendment con-

texts, *see Michigan v. Jackson*, 475 U.S. 625 (1986), the defendant's invocation of his Sixth Amendment right to counsel by appearing with an attorney on the Milwaukee County charges could not possibly be deemed to have barred police-initiated interrogation on the Racine County offenses since, with respect to them, the Sixth Amendment right to counsel had not attached. To trigger the *Edwards* rule in this case, that appearance with an attorney would have to be regarded as an invocation of the Fifth Amendment right to counsel.

The critical issue in this case, then, is whether a defendant who appears with counsel[1] at a court hearing on a criminal charge

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[1]The "question presented" in this case refers to both the defendant's "appearance with counsel" and his "acceptance of assistance of counsel" (defendant's brief at i). Throughout this brief, the state, in the interest of brevity, refers only to the appearance with counsel, but it intends thereby to subsume the acceptance of assistance of counsel as well, and the arguments it makes are intended to cover both situations.

thereby invokes his Fifth Amendment right to counsel. That issue can be approached from five perspectives, all of which lead to the conclusion that a defendant who appears with counsel at a court hearing on a criminal charge does not thereby invoke his Fifth Amendment right to counsel:

1. Principle. To resolve the issue presented, it is necessary to establish some principled basis by which to judge whether a particular invocation of the right to counsel is an invocation of the Fifth Amendment right to counsel. The Fifth Amendment right to counsel is part of the scheme this Court created in *Miranda* to protect the privilege against self-incrimination in the context of custodial interrogation. That scheme includes the giving of the now-familiar warnings about the defendant's rights during custodial interrogation, the securing of a valid waiver of those rights, and the restraints on the conducting of custodial

interrogation if those rights are invoked. Thus, a principled approach to the question whether the Fifth Amendment right to counsel has been invoked would ask whether the request for counsel was made by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation. That does not describe the request for counsel implicit in a defendant's appearance with counsel at a court hearing.

2. Perception. In *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), this Court, in determining whether the *Edwards* rule was triggered by the particular reference to counsel made by the defendant in that case, looked to how "ordinary people" would understand the defendant's words. A similar approach is appropriate here. An "ordinary person" would perceive a defendant's appearance with counsel at a court hearing on a particular charge as an invocation of the

Sixth Amendment right to counsel and not of the Fifth Amendment right to counsel.

3. Policy. In determining the scope of the prophylactic rules that *Miranda* and its progeny have established, this Court must consider "two competing concerns": first, the need for police questioning as a tool for effective enforcement of criminal laws; second, the need to protect against compelled self-incrimination. *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Here, society's "legitimate and substantial interest in securing admissions of guilt" from wrongdoers, *id.* at 427, would be significantly impeded by a rule precluding police-initiated interrogation about an uncharged offense after the defendant has appeared with counsel at a court hearing on an unrelated, charged offense. And the competing concern about compelled self-incrimination does not have sufficient substance to warrant adoption of such a rule, for the pros-

pect of police "badgering" against which such rule would protect is all but nonexistent in the present context.

4. Perspicuity. This Court has "repeatedly emphasized the virtues of a *bright-line rule* in cases following *Edwards* as well as *Miranda*." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (emphasis supplied). Neither of the two opposing rules sought by the parties here has a greater claim to providing "bright-line" guidance in the specific situation to which the rules are addressed. But, once one considers their impact in situations to which they might not directly apply, but in which they might be examined for guidance, the state's rule, based as it is on a principled analysis of the issue, would promote clarity in application of the *Edwards* rule, while the defendant's would not.

5. Precedent. The majority of state courts confronting the issue presented in

this case conclude that an appearance with counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel. The federal circuit court of appeals' decisions are more evenly split on the issue, but those supporting the defendant's position provide cause for questioning the desirability of adopting that position.

Contrary to the defendant's contention, precedent from this Court has not resolved the issue. It must be resolved by examining the five factors the state has surveyed above--principle, perception, policy, perspicuity, and the precedent from other jurisdictions that has directly decided the issue--all of which lead to one conclusion: a defendant who appears with counsel at a court hearing in a criminal prosecution does not thereby invoke his Fifth Amendment right to counsel.

ARGUMENT

THE DEFENDANT'S APPEARANCE WITH COUNSEL AT AN INITIAL HEARING ON AN ARMED ROBBERY CHARGE WAS NOT AN INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL THAT BARRED POLICE-INITIATED INTERROGATION ABOUT UNRELATED, UNCHARGED OFFENSES.

A. The issue presented in this case is whether a defendant who appears with counsel at a court hearing on a criminal charge thereby invokes his Fifth Amendment right to counsel.

At issue in this case is the admissibility of statements the defendant made to the police about his participation in crimes that occurred in Racine County, Wisconsin, including murder, attempted murder, burglary, and armed robbery. Before making those statements, the defendant had been brought before a judicial court commissioner for an initial appearance on unrelated charges in Milwaukee County (i.e., three counts of armed and masked robbery) (R. 31:2; J.A.

8).[2] At that initial appearance, the defendant appeared with an attorney from the public defender's office (R. 32:2; J.A. 7).[3] The defendant's statements about the Racine County crimes were the product of police-initiated interrogation that occurred after the court appearance on the Milwaukee County charges, but before formal criminal charges were filed on the Racine County offenses.

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[2]Under Wisconsin law, "[a]ny person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed." Sec. 970.01(1), Wis. Stats. At that initial appearance, the judge is to inform the defendant of the charge against him, of his right to counsel, and of his right to a preliminary examination. Sec. 970.02(1), Wis. Stats. The judge also is required to "admit the defendant to bail." Sec. 970.02(2), Wis. Stats.

[3]Under the administrative rules governing the Wisconsin State Public Defender, the public defender or his designee "shall advise all persons charged with a crime, . . . *prior to their initial court appearance*, that they have a right to be represented by an attorney in the proceeding without charge if found indigent." Wis. Admin. Code § SPD 2.03(5) (1990) (emphasis supplied).

The defendant contends that the statements he made about the Racine County crimes were obtained in violation of the rule this Court created in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), hereinafter "the *Edwards* rule":

> [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

In considering the defendant's contention, it is necessary to recognize that there are two distinct rights to counsel that potentially come into play when a defendant is interrogated by the police. *See Michigan v. Jackson*, 475 U.S. 625, 629 (1986). The first is the **Fifth Amendment** right to counsel recognized in *Miranda v. Arizona*, 384 U.S. 436, 470-71 (1966), which this Court created to protect the privilege against self-incrimination and which applies

whenever a criminal suspect is subjected to custodial interrogation. The other is the **Sixth Amendment** right to counsel directly conferred by the Constitution, which attaches after the formal initiation of a criminal prosecution and which precludes the police from deliberately eliciting statements from the defendant in counsel's absence from that point on. *Maine v. Moulton*, 474 U.S. 159, 170-74 (1985).

In arguing that the *Edwards* rule barred police-initiated interrogation regarding the Racine County offenses after his appearance with counsel at his initial hearing on the Milwaukee County charges, the defendant relies primarily on two post-*Edwards* decisions of this Court:

- **Michigan v. Jackson**, 475 U.S. 625 (1986), in which this Court extended the *Edwards* rule, which was initially recognized "as a corollary" to the Fifth Amendment right to counsel, *see Arizona v. Roberson*, 486 U.S. at 680, to the Sixth Amendment right to counsel. Under *Jackson*, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar

proceeding, of his [Sixth Amendment] right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636.

- **Arizona v. Roberson**, 486 U.S. 675 (1988), in which this Court made it clear that *Edwards* is not in any way "investigation-specific." 486 U.S. at 684. If a defendant invokes his right to counsel during custodial interrogation, i.e., his Fifth Amendment right to counsel, the *Edwards* rule bars police-initiated interrogation, even though that request for counsel occurred in the context of a separate investigation. 486 U.S. at 682.

Though he relies on passages from *Michigan v. Jackson* to support his position, the defendant does not suggest that it is controlling here. The reason for that is obvious: the Sixth Amendment right to counsel whose invocation triggers the *Edwards* rule under *Jackson* does not attach to interrogation about uncharged offenses. *See Arizona v. Roberson*, 486 U.S. at 685; *Maine v. Moulton*, 474 U.S. at 180 n.16. Thus, the defendant's invocation of his Sixth Amendment right to counsel at the initial appearance on the Milwaukee County charges could

not possibly have rendered improper the police-initiated interrogation about the Racine County offenses. That interrogation occurred before the defendant was formally charged with those offenses, so he had no Sixth Amendment right to counsel with respect to them.

The defendant makes no contention to the contrary. He does not argue that his invocation of his Sixth Amendment right to counsel barred further police-initiated interrogation about the Racine County crimes, with respect to which that right had not attached. And, so far as the state is aware, no authority exists that would support such a contention. All the decisions that support the defendant's position that the *Edwards* rule applies in the present context do so only after first finding that a defendant's invocation of his right to counsel at a court appearance constitutes an invocation not only of his Sixth Amendment right to

counsel, but of his Fifth Amendment right as well. *See, e.g., United States v. Wolf*, 879 F.2d 1320, 1322-23 (6th Cir. 1989), and *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 120-21 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

Rather than arguing that *Jackson* is controlling here, the defendant relies on *Arizona v. Roberson* as the critical case supporting his position. As already indicated, *Roberson* holds that an invocation of the Fifth Amendment right to counsel triggers *Edwards* and bars police-initiated interrogation not just about the offense with respect to which that right to counsel has been invoked, but about any offense. The defendant argues that his appearance with counsel on the Milwaukee County charges invoked not only his Sixth Amendment right to counsel on those charges, but his Fifth Amendment right to counsel on them as well. Thus, under *Roberson*, police-initiated interrogation

about any offenses, including the Racine County crimes, was barred by the *Edwards* rule.

The critical issue facing this Court, then, is whether a defendant who appears with counsel at a court hearing on a criminal charge thereby invokes his Fifth Amendment right to counsel.[4] This Court left that issue unresolved in *Michigan v. Jackson*, 475 U.S. at 630 n.4, and has not

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[4]By labeling the issue presented as "critical," the state is saying only that it is critical to the defendant's success in this case, not that it is necessarily critical to the state's success here. Even if the defendant were to convince this Court that an accused appearing with counsel at a court hearing thereby invokes his Fifth Amendment right to counsel, there would still remain the question whether an invocation of the Fifth Amendment right to counsel at a court hearing on a charged offense, rather than at interrogation as was the case in *Roberson*, should, under *Roberson*, trigger the *Edwards* rule and bar police-initiated interrogation about other unrelated, uncharged offenses. But, because it does not believe this Court will find an invocation of the Fifth Amendment right to counsel under circumstances such as those presented here, the state sees no need to address that question.

resolved it since (see discussion at pages 62-65 of this brief regarding decisions and orders of this Court that the defendant asserts have "implicitly" resolved the issue presented, but which in fact have not).

The issue presented can be approached from five perspectives, all of which lead to the conclusion that a defendant who appears with counsel at a court hearing on a criminal charge does *not* thereby invoke his Fifth Amendment right to counsel:

- **Principle:** Considering the context in which the Fifth Amendment right to counsel operates, the only principled way to decide whether that right has been invoked is to ask whether the request for counsel was made by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation, which does not describe a defendant's appearance with counsel at a court hearing.

- **Perception:** An "ordinary person" would perceive a defendant's appearance with counsel at a court hearing on a particular charge as an invocation of the right to counsel conferred by the Sixth Amendment and not of the right to counsel created to protect the Fifth Amendment privilege against self-incrimination.

- **Policy:** A balancing of society's "legitimate and substantial interest in securing admissions of guilt" from wrongdoers against the minimal increase in protection against compelled self-incrimination that adoption of the defendant's position would afford results in the conclusion that an appearance with counsel at a court hearing on a charged offense should not be deemed an invocation of the Fifth Amendment right to counsel that would bar police-initiated interrogation about unrelated offenses.

- **Perspicuity:** A holding that the Fifth Amendment right to counsel is not invoked by appearance with counsel at a court hearing on a charged offense would provide a "bright-line" rule that would most closely accord with reality and that would afford the clearest guidance to those involved in the administration of the criminal justice system.

- **Precedent:** The majority of state courts confronting the issue presented in this case conclude that an appearance with counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel; the federal circuit court of appeals' decisions are more evenly split on the issue, but those supporting the defendant's position provide cause for questioning the desirability of adopting that position; and, contrary to the defendant's contention, precedent from this Court has not resolved the issue.

Each of these perspectives on the issue presented is individually explored in the following sections of this brief.

B. Examining the issue presented from the perspective of principle: Considering the context in which the Fifth Amendment right to counsel operates, the only principled way to decide whether that right has been invoked is to ask whether the request for counsel was made by an in-custody suspect in response to Miranda warnings, or in direct anticipation of, or during, interrogation, which does not describe a defendant's appearance with counsel at a court hearing.

To resolve the issue presented, it is necessary to establish some principled basis by which to judge whether a particular invocation of the right to counsel is an invocation of the Fifth Amendment right to counsel recognized in *Miranda*. That principled basis is found in the *Miranda* decision itself.

In *Miranda*, this Court set up procedures designed to protect the Fifth Amendment privilege against self-incrimination in the context of "custodial interrogation." 384 U.S. at 444. Among them was the requirement that interrogation cease upon a request for counsel. In the brief description of those

procedures set forth at the outset of the *Miranda* decision, this Court described the request for counsel that would require a cessation of questioning:

> If, however, [the defendant] indicates in any manner and *at any stage of the process* that he wishes to consult with an attorney before speaking there can be no questioning.

Miranda v. Arizona, 384 U.S. at 444-45 (emphasis supplied).

In the context of the *Miranda* decision, which was addressing police interrogation outside the setting of formally initiated criminal proceedings, the "process" to which the decision refers is obviously the process of custodial interrogation and the procedures this Court created to govern it. Those procedures consist of the giving of the now-familiar warnings about the defendant's rights during custodial interrogation, the securing of a valid waiver of those rights, and the restraints on the conducting of custodial interrogation if those

rights are invoked. Thus, to be invoked "at any stage of the process," the request for counsel would have to be made by an in-custody suspect in response to the administration of the warnings prescribed in *Miranda*, or in direct anticipation of, or during, interrogation.

That, of course, does not describe the situation here. The invocation of the right to counsel implicit in the defendant's appearance with counsel at the initial hearing had nothing to do with the administration of *Miranda* warnings. Nor was it made during, or in direct anticipation of, custodial interrogation. No such interrogation was occurring, and none was being anticipated at the time.

To support his contention that his appearance with counsel was an invocation of his Fifth Amendment right to counsel, the defendant invokes this Court's observation in *Michigan v. Jackson*, 475 U.S. at 633,

regarding the need "to give a broad, rather than a narrow interpretation to a defendant's request for counsel" (defendant's brief at 9-10, 15). Whether that observation has any application here is questionable, and it certainly provides no principled basis for deciding whether the Fifth Amendment right to counsel has been invoked.

The *Jackson* admonition that a request for counsel should be given a "broad" interpretation was made in the context of determining how broad an interpretation should be given to the defendant's invocation of a specific right to counsel: his Sixth Amendment right to counsel. Was the invocation of the Sixth Amendment right to counsel simply a request for counsel's representation at formal legal proceedings, or did it extend as well to other critical stages of the prosecution, including interrogation?

The question here is not how broadly an invocation of a particular right to counsel

should reach insofar as the stages of the prosecution are concerned. Rather, it is whether the right was invoked at all. It is one thing to give a broad interpretation to an invocation of the Sixth Amendment right to counsel to find that it reaches all critical stages of the prosecution; quite another to give it a broad interpretation that transmutes it into an invocation of the Fifth Amendment right to counsel.

In any case, the "broad interpretation" language of *Jackson* fails to provide a principled basis upon which to decide whether a defendant has invoked his Fifth Amendment right to counsel. Under it, all invocations of the Sixth Amendment right to counsel would perforce become invocations of the Fifth Amendment right to counsel.

Such an approach would ignore the very real differences between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel. *See Arizona v. Roberson*,

486 U.S. at 685. The Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a particular crime." *Id.* It applies to every "critical stage" of a criminal prosecution. *Maine v. Moulton*, 474 U.S. at 170. And it does not depend on a defendant's being in custody. *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980); *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980).

The Fifth Amendment right to counsel, on the other hand, is not dependent on the initiation of formal criminal proceedings. *Arizona v. Roberson*, 486 U.S. at 685. It applies only to interrogation. *Rhode Island v. Innis*, 446 U.S. at 298. And it requires custody. *United States v. Henry*, 447 U.S. at 273 n.11.

Those significant differences in the two rights' applicability should, as a matter of principle, produce differences in the circumstances under which they will be deemed

invoked. The "broad interpretation" approach, under which an invocation of the Fifth Amendment right to counsel would be found whenever there has been an invocation of the Sixth Amendment right to counsel, ignores those differences and thus produces an unprincipled approach to the problem.

Moreover, the "broad interpretation" approach would divorce the invocation of the Fifth Amendment right to counsel from *Miranda* warnings and custodial interrogation. It would thus completely cut that right loose from the *Miranda* decision and the procedures it established to protect the Fifth Amendment privilege against self-incrimination in the context of custodial interrogation. For that reason, it should be rejected. *Cf. Beckwith v. United States*, 425 U.S. 341, 345 (1976) (rejecting a particular application of *Miranda* because it would "cut this Court's holding in [*Miranda*] completely loose from its own explicitly

stated rationale"); *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (same).

This Court should adopt the principled approach suggested by the state. An invocation of the Fifth Amendment right to counsel should be found only when a request for counsel is made by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation. That does not describe the request for counsel implicit in a defendant's appearance with counsel at a court hearing.

C. Examining the issue presented from the perspective of perception: An "ordinary person" would perceive a defendant's appearance with counsel at a court hearing on a particular charge as an invocation of the right to counsel conferred by the Sixth Amendment and not of the right to counsel created to protect the Fifth Amendment privilege against self-incrimination.

In *Connecticut v. Barrett*, 479 U.S. 523 (1987), this Court was called upon to decide whether the *Edwards* prohibition on further

police-initiated interrogation once an accused has invoked his right to counsel should have barred further police interrogation of a suspect who, "though stating his willingness to speak to police, had indicated that he would not make a written statement outside the presence of counsel." 479 U.S. at 525. The defendant invoked the broad-interpretation-of-requests-for-counsel approach referred to in the preceding section of this brief, contending it supported his position. This Court disagreed:

> [W]e observe that this approach does little to aid respondent's cause. Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous. . . . To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

479 U.S. at 529-30.

Although *Barrett* dealt with the interpretation of an invocation of the Fifth Amend-

ment right to counsel, its approach also provides an appropriate benchmark for judging whether a defendant has invoked that right at all. In making that judgment, this Court should ask how an "ordinary person" would perceive the defendant's action.

Applying that test here, there is no basis for finding that a defendant invokes his Fifth Amendment right to counsel when he appears with counsel at a court hearing on a charged offense. The perception of the "ordinary person" would be that, by such action, the defendant was seeking the assistance of counsel in facing the particular charge being prosecuted--the assistance that the Sixth Amendment guarantees. Concededly, the "ordinary person" might view the invocation of the right to counsel implicit in the appearance with counsel as extending beyond the court proceedings regarding the charged offense to police interrogation about it. But, in so doing, the "ordinary person"

would view the assistance of counsel at such interrogation as being tied to and growing out of the particular offense charged--still the assistance that the Sixth Amendment guarantees. *See Arizona v. Roberson*, 486 U.S. at 685. An "ordinary person" would not view a defendant's appearance with counsel at a court hearing as evincing a general desire for counsel's assistance in dealing with any police questioning to which he might be subjected, including that about other uncharged offenses--the assistance that *Miranda* guarantees to protect the Fifth Amendment privilege against self-incrimination.

The defendant would no doubt respond to the foregoing with the quotation from *Michigan v. Jackson*, 475 U.S. at 633-34 n.7, that he sets out at pages 15-16 of his brief:

> "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an ac-

> cused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. . . ."

That quotation does not undercut the state's argument for two reasons. First, the words in that quotation are not those of this Court, but of the Michigan Supreme Court in the decision being reviewed in *Michigan v. Jackson*. Concededly, the words were quoted with this Court's express approval, but it is unlikely that this Court meant them to have any meaning other than that intended by their author. As this Court expressly recognized in *Jackson*, the Michigan Supreme Court, in its decision, concluded that a defendant requesting counsel at an arraignment does not thereby invoke his Fifth Amendment right to counsel. 475 U.S. at 630 n.4. Obviously, the words from the Michigan Supreme Court's decision set out above could not have been intended

by that court to support a contrary conclusion. Neither should this Court's quotation of them.

More importantly, irrespective of the meaning of the words that was intended by the Michigan Supreme Court, those words are not, on their face, necessarily inconsistent with the state's position that an "ordinary person" would view a defendant's request for counsel at a court appearance on a charged offense only as an invocation of his Sixth Amendment, and not as an invocation of his Fifth Amendment, right to counsel. Concededly, the "ordinary person" would probably not be able to attach the appropriate label to his or her view of the right to counsel that is being invoked. But, as indicated above, the "ordinary person" would be able to perceive the substance of what is being sought: the assistance of counsel to meet a particular charge, both at the court proceedings relating to that charge and perhaps

at police interrogation about it. That precisely describes what the Sixth Amendment guarantees. And the focus on the particular charge inhering in that perception nullifies any notion that it is the Fifth Amendment right to counsel that is being invoked, for that right is in no way tied to a particular offense, *see Arizona v. Roberson*, 486 U.S. at 685, and certainly is not limited to charged offenses. Thus, though unable to affix the proper label to the conclusion, the "ordinary person" would understand that it is the Sixth Amendment right to counsel, and not the Fifth Amendment right, that a defendant is invoking when he appears with counsel on a charged offense.

Giving a defendant's appearance with counsel at a court hearing on a charged offense its "ordinary meaning," as *Barrett* counsels should be done, there is no basis for finding an invocation of the Fifth

Amendment right to counsel implicit in such an appearance:

> [T]o find that [the defendant] invoked his Fifth Amendment right to counsel on the present charges merely by requesting the appointment of counsel at his arraignment on the unrelated charge is to disregard the ordinary meaning of that request.

State v. Stewart, 113 Wash. 2d 462, 780 P.2d 844, 849 (1989).

D. Examining the issue presented from the perspective of policy: A balancing of society's "legitimate and substantial interest in securing admissions of guilt" from wrongdoers against the minimal increase in protection against compelled self-incrimination that adoption of the defendant's position would afford results in the conclusion that an appearance with counsel at a court hearing on a charged offense should not be deemed an invocation of the Fifth Amendment right to counsel that would bar police-initiated interrogation about unrelated offenses.

This section of the state's brief will examine the policy implications of the ruling this Court is being asked to make. In undertaking that examination, there are "two

competing concerns" that must be considered. *Moran v. Burbine*, 475 U.S. 412, 426 (1986). On one side of the scales is "'the need for police questioning as a tool for effective enforcement of criminal laws.'" *Id.* On the other is the "risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Id.* An examination of the two sides of the scales reveals that a proper striking of the balance in this case between the two competing concerns requires rejection of the defendant's position.

On one side of the scales: the interest in effective law enforcement. There is no doubt, under this Court's decisions, that this interest lies heavy in the scales. As this Court noted in *Miranda*: "Confessions remain a proper element in law enforcement." 384 U.S. at 478. "[F]ar from being prohibited by the Constitution, admissions of

guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977); *accord Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

Indeed, they are more than "desirable," they are "essential":

> Admissions of guilt are more than merely "desirable," [citation omitted]; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.

Moran v. Burbine, 475 U.S. at 426.

In short, society has a "legitimate and substantial interest in securing admissions of guilt" from wrongdoers. *Moran v. Burbine*, 475 U.S. at 427.

There is little doubt that a holding that *Edwards* is applicable in the present context would seriously impede police investigative activity aimed at securing admissions of guilt. Common sense and experience teach that numerous criminal defendants formally charged with one crime are suspects in oth-

ers, sometimes, as in this case, arising from other jurisdictions. *See Arizona v. Roberson*, 486 U.S. at 689 (Kennedy, J., dissenting). Once the suspect has been charged with an offense, his appearance with counsel at a court hearing on that offense would be all but inevitable, given the public defender system in place in so many jurisdictions. Thus, a person charged with a criminal offense would almost invariably be immunized from any police-initiated interrogation regarding other offenses of which he is suspected. That would create a substantial impediment to the effective investigation of criminal activity.

On the other side of the scales: the interest in protecting the defendant's privilege against self-incrimination. This interest, though obviously substantial in the abstract, has little weight in this case. At issue here is the scope of the application of the *Edwards* rule prohibiting police-

initiated interrogation after an invocation of the Fifth Amendment right to counsel. *Edwards* is a prophylactic rule designed to safeguard the Fifth Amendment privilege against self-incrimination. But, as such, it does not operate directly to protect that privilege. Rather, it simply serves as a "corollary"--a "second layer of protection"--to yet another prophylactic rule: the requirement of *Miranda* that interrogation cease upon a request for counsel. *Minnick v. Mississippi*, 59 U.S.L.W. 4037, 4038 (U.S. Dec. 3, 1990); *Arizona v. Roberson*, 486 U.S. at 680; *Michigan v. Harvey*, 110 S. Ct. 1176, 1180 (1990). The *Miranda* rule, in turn, was created to directly safeguard the privilege against compelled self-incrimination actually provided by the Constitution. *Id.*

What this Court is dealing with here, then, is "prophylaxis built upon prophylaxis." *Minnick v. Mississippi*, 59 U.S.L.W. at 4042 (Scalia, J., dissenting). It is oper-

ating at the outer fringes of the elaborate scheme of protection of the Fifth Amendment that *Miranda* and its progeny have created.

With the prophylactic rule at issue (i.e., the *Edwards* rule) so far removed from the actual command of the Fifth Amendment, a claim that its application in the present context is necessary to protect the Fifth Amendment privilege can properly be viewed with skepticism. And an examination of the fears that prompted the rule reveals that they have little substance in the situation presented here.

The *Edwards* rule is designed to protect an accused in police custody "from being badgered" by the police. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983); *accord Smith v. Illinois*, 469 U.S. 91, 98 (1984). Apparently, this Court's concern in that regard is that "the suspect may believe his rights are fictitious if he must assert them a second time." *Arizona v. Roberson*, 486

U.S. at 690 (Kennedy, J., dissenting, but describing the majority's concern).

That concern has little substance in the present context. As already pointed out above in the section of this brief dealing with the question of "perception," a defendant appearing with counsel at a court hearing on a particular charge would ordinarily view the invocation of the right to counsel implicit in such appearance as an invocation of the right to counsel that the Sixth Amendment affords to assist him in dealing with the State on the particular charged offense. He would not view it as an invocation of his right to counsel at interrogation on other uncharged offenses that *Miranda* affords.

Thus, police initiation of interrogation about other uncharged offenses would not be viewed as incompatible with the invocation of the right to counsel inherent in the earlier appearance with counsel. The police-

initiated interrogation about other offenses would not give the defendant pause to wonder whether the right to counsel he had implicitly invoked was fictitious, for the defendant would not perceive any inconsistency between his invocation of his right to counsel on a charged offense, made by appearing with counsel at a proceeding relating to that offense, and the initiation of interrogation about other offenses.

In short, the prospect of police "badgering" against which the *Edwards* rule is designed to protect is all but nonexistent in the situation presented here, where there has been no invocation of the right to counsel in the context of custodial interrogation and the police-initiated interrogation concerns offenses other than the charged offense with respect to which counsel was invoked at a court proceeding.

Moreover, it must be remembered that a refusal to apply *Edwards* in situations such

as that presented here would not leave an accused defenseless against compelled self-incrimination. There would still remain the prophylactic safeguards directly afforded by *Miranda*: the admonition regarding the rights to silence and counsel and the need to secure a waiver of those rights before interrogation commenced. *See State v. Stewart*, 780 P.2d at 851 n.4.

Consideration of whether the need to protect a defendant's Fifth Amendment privilege warrants application of the *Edwards* rule in situations such as that presented here would not be complete without some discussion of the facts of this case. The present defendant can hardly make a credible claim that he was subjected to the sort of "badgering" about which *Edwards* is concerned in view of the testimony that: the police interview with him following his court appearance with counsel was prompted, at least in part, by his girlfriend's statement that he had indi-

cated, prior to that court appearance, that he wanted to talk to the officer who interviewed him (R. 43:8-9); and, at that interview, he was the one who broached the subject of the crimes at issue in this case before the police officer could even begin to talk to him about anything else (R. 40:14). Under *Edwards*, that testimony is irrelevant, however, because, once the right to counsel has been invoked, any statements taken from a defendant during an interview that the police subsequently initiate are inadmissible.

This fact--that testimony showing that the defendant affirmatively wanted to talk about the crimes at issue in this case would have no role to play in the disposition of this case if the *Edwards* rule were found applicable here--demonstrates how far the rule is removed from the evil against which it is designed to protect: compelled self-incrimination. It demonstrates the folly

of applying the *Edwards* rule in the present context. Application of that rule here would require suppression of statements that the record clearly reveals the defendant affirmatively wanted to make.

Balancing the scales. At some point the increase in the protection from compelled self-incrimination afforded by the *Edwards* rule becomes too slight, and the increase in the interference with effective law enforcement too severe, to warrant application of that rule. That point has been reached in this case. As a matter of sound policy, this Court should reject the notion that the *Edwards* rule has any applicability when a defendant appears with counsel at a court proceeding on a charged offense and then is subjected to custodial interrogation about other uncharged offenses.

E. Examining the issue presented from the perspective of perspicuity: A holding that the Fifth Amendment right to counsel is not invoked by appearance with counsel at a court hearing on a charged offense would provide a "bright-line" rule that would most closely accord with reality and that would afford the clearest guidance to those involved in the administration of the criminal justice system.

As the defendant points out in his brief (defendant's brief at 30), this Court has "repeatedly emphasized the virtues of a *bright-line rule* in cases following *Edwards* as well as *Miranda*." *Arizona v. Roberson*, 486 U.S. at 681 (emphasis supplied). It has also pointed out that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 59 U.S.L.W. at 4038. Thus, resolution of the question whether *Edwards* should apply when a defendant who has appeared with counsel at court proceedings on a charged offense is subjected to police-initiated interrogation about

other, unrelated and uncharged offenses requires consideration of the effect of a decision one way or the other on the clarity of the application of *Edwards*.

Insofar as a "bright-line" rule is concerned, neither party to this appeal has an advantage over the other. The defendant seeks a rule that an accused who appears with counsel at a court proceeding on a charged offense thereby invokes his Fifth Amendment right to counsel and consequently triggers the *Edwards* rule forbidding any further police-initiated interrogation on any offense, including other, uncharged offenses. Unquestionably, that is a "bright-line" rule.

The state seeks a rule that an accused who appears with counsel at a court proceeding on a charged offense does *not* thereby invoke his Fifth Amendment right to counsel and consequently does *not*, at least insofar as unrelated, uncharged offenses are con-

cerned, trigger the *Edwards* rule forbidding any further police-initiated interrogation. That is every bit as "bright line" a rule as the one the defendant seeks. Based purely on the nature of the rule each party asks this Court to adopt, this Court's penchant for "bright-line" rules should not incline it to favor either party's position over the other's.

That, however, does not mean that a desire for clarity in the administration of the *Edwards* rule has no role to play in the disposition of this case. On their face, neither of the two rules sought by the parties has a greater claim to providing "bright-line" guidance when those involved in the administration of the criminal justice system face the specific situation to which the rules are addressed. But, once one moves beyond the face of the rules and considers their impact in situations to which they might not be directly applicable,

but in which they might be examined for guidance, the situation changes. Adoption of the state's rule would promote clarity in application of the *Edwards* rule, while adoption of the defendant's would undermine it.

To see that, one need only consider what the state has already pointed out in the section of this brief where the issue presented has been viewed from the perspective of "principle." There, the state demonstrated that the rule it proposes is based on the principled position that an invocation of the Fifth Amendment right to counsel only occurs when the right to counsel is invoked by an in-custody suspect in response to *Miranda* warnings, or in direct anticipation of, or during, interrogation. The rule the defendant proposes, on the other hand, is based on the unprincipled "broad interpretation" approach to invocations of the right to counsel.

The state's position, grounded as it is in the *Miranda* decision, provides a clear basis for deciding when an invocation of the right to counsel constitutes an invocation of the Fifth Amendment right to counsel. It establishes a benchmark that can be invoked in contexts other than that presented here to decide whether there has been an invocation of the Fifth Amendment right to counsel.

The defendant's position, on the other hand, leaves a court at sea when confronted with the question of whether there has been an invocation of the Fifth Amendment right to counsel. Unless every request for counsel--whenever, wherever, and however made--constitutes an invocation of the Fifth Amendment right to counsel--a position the state does not believe could be rationally defended--the "broad interpretation" approach underlying the rule the defendant proposes provides no real guidance to one

trying to determine whether there has been an invocation of the Fifth Amendment right to counsel. Rather than promote clarity, adoption of the defendant's rule would promote the confusion that a "bright-line" rule is supposed to dispel. For that reason, it should be rejected.

There is another reason for rejecting the defendant's proposed "bright-line" rule and adopting the state's. As a matter of principle, "bright-line" rules ought generally to accord with reality. Certainly in the Fourth Amendment context that appears to have been a guiding precept. For example, in creating a "bright-line" rule governing the scope of warrantless searches of an automobile pursuant to an arrest, this Court permitted a search of the passenger compartment of the automobile because

> articles inside the relatively narrow compass of the passenger compartment of an automobile *are in fact generally, even if not inevitably,* within 'the area into which an arrestee might

> reach in order to grab a weapon or evidentiary ite[m].'"

New York v. Belton, 453 U.S. 454, 460 (1981) (emphasis supplied).

Reality counsels in favor of adopting the state's proposed "bright-line" rule. As pointed out in the section of this brief dealing with the question of "perception," the "ordinary person" would view an appearance with counsel at a court hearing on a criminal charge as an invocation of the right to counsel that is afforded by the Sixth Amendment, and not of the right to counsel that has been created to protect the Fifth. Even if it is not invariably the case that a defendant appearing with counsel at a court hearing on a criminal charge would share the "ordinary person's" view that it is his Sixth- Amendment right to counsel and not his Fifth that he is invoking by such appearance, that would generally be true. And others involved in the criminal justice system--defense counsel, prosecuting attorneys, police officers, etc.--would, as a general proposition, certainly share the "ordinary person's" view.

Thus, as a general proposition, the state's proposed rule accords with reality. The defendant's does not. For that reason, this Court should accept the state's and reject the defendant's.

F. Examining the issue presented from the perspective of precedent: The majority of state courts confronting the issue presented in this case conclude that an appearance with counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel; the federal circuit court of appeals' decisions are more evenly split on the issue, but those supporting the defendant's position provide cause for questioning the desirability of adopting that position; and, contrary to the defendant's contention, precedent from this Court has not resolved the issue.

The Wisconsin Supreme Court does not stand alone in holding that an invocation of

the right to counsel at a court hearing on a charged offense is not an invocation of the Fifth Amendment right to counsel. While the courts are divided on the issue, the majority have lined up with the Wisconsin Supreme Court's decision in this case, at least in the state courts.

The appellate courts in the following states stand with the Wisconsin Supreme Court:

- **Arizona:** *State v. Hitch*, 160 Ariz. 297, 772 P.2d 1150, 1152-54 (Ct. App. 1989).
- **Illinois:** *People v. Bryant*, 559 N.E.2d 930, 934-38 (Ill. App. Ct. 1990); *People v. Jackson*, 145 Ill. Dec. 1, 198 Ill. App. 3d 831, 556 N.E.2d 619, 624-28 (1990).
- **Michigan:** *People v. Crusoe*, 433 Mich. 666, 449 N.W.2d 641, 647-54 (1989); *People v. Bladel*, 421 Mich. 39, 365 N.W.2d 56, 61-63 (1984), *aff'd on other grounds sub. nom. Michigan v. Jackson*, 475 U.S. 625 (1986).
- **Oregon:** *State v. Sparklin*, 296 Or. 85, 672 P.2d 1182, 1183-90 (1983).
- **Pennsylvania:** *Commonwealth v. Davis*, 565 A.2d 459, 459-62 (Pa. Super. Ct. 1989).
- **Washington:** *State v. Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 846-53 (1989).

The state's research has uncovered only two state jurisdictions that adhere to a contrary position:

- **Arkansas:** *Sutherland v. State*, 299 Ark. 86, 771 S.W.2d 264, 265-66 (1989).
- **Vermont:** *State v. Preston*, 150 Vt. 511, 555 A.2d 360, 362-63 (1988).

More important than numbers, however, is the quality of the decisions on the two sides of the issue. The decisions supporting the Wisconsin Supreme Court's holding in this case are marked by extended and thoughtful analysis of the issue. The two opposing decisions, by contrast, either have no analysis of the issue at all (*Sutherland*), or have simply followed, without any real independent exploration of the issue, the Seventh Circuit Court of Appeals' decision in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (*Preston*).

That brings us to the federal precedent on the issue. Here, the split in the authority is more evenly divided.

The Seventh Circuit Court of Appeals, in *Espinoza*, reached a decision directly contrary to the Wisconsin Supreme Court's decision in this case. But it did so by invoking the "broad interpretation" approach to requests for counsel that, as the state has shown earlier in this brief, provides no principled basis for resolving the issue presented. 813 F.2d at 122-23.

Opposing *Espinoza* and supporting the Wisconsin Supreme Court's decision in this case is the decision of the Second Circuit Court of Appeals in *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989):

> Roberts, however, would have us hold that once an accused has asserted his Sixth Amendment right to counsel, *Edwards* acts as a bar that will invalidate any waiver of the Fifth Amendment right to counsel in an investigation of a wholly new incident. It would thus be impossible for a suspect to waive his right to counsel and for

> questioning on a new offense to proceed if the accused had asserted his right to counsel at any earlier point in his dealings with the authorities.
>
> We see no reason for such an extension of *Edwards*.

Not quite so clearly lined up on either side of the issue, however, are the Fourth, Sixth, and Eleventh Circuits. In its decision in *Butler v. Aiken*, 864 F.2d 24, 25 (4th Cir. 1988), which was ultimately to be sustained by this Court on other grounds (i.e., the nonretroactivity of *Roberson*), *see Butler v. McKellar*, 110 S. Ct. 1212 (1990), the Fourth Circuit "*assume[d] for purposes of decision* that the appearance of counsel with Butler at a bond hearing on the assault charge for which he was first arrested conclusively demonstrated invocation of Butler's fifth amendment rights" (emphasis supplied).

The Sixth Circuit's decisions are a mixed bag. In *Boles v. Foltz*, 816 F.2d 1132, 1135 (6th Cir.), *cert. denied*, 484 U.S. 857

(1987), the court held that a desire for counsel at the preliminary hearing to be held on the charged offense--a desire expressed at an arraignment on the charge--was not an invocation of the Fifth Amendment right to counsel that barred police-initiated interrogation about other offenses. In *United States v. Wolf*, 879 F.2d 1320, 1323 (6th Cir. 1989), the court held that a general request, made at an arraignment, for appointed counsel that was not tied to any particular upcoming court appearance, as had been the request in *Boles*, constituted an invocation of the Fifth Amendment right to counsel that barred police-initiated interrogation. Finally, in *United States v. Hall*, 905 F.2d 959, 963 (6th Cir. 1990), the court found that a request for counsel at an arraignment on an escape charge did constitute an invocation of the Fifth Amendment right to counsel, but that it did *not* bar police-initiated interrogation two months

later (during the two months the defendant had apparently been kept in continuous custody) on an unrelated charge.

The Sixth Circuit's decisions demonstrate what happens when a court adopts the present defendant's position. To avoid the detrimental impact of the *Edwards* rule on effective law enforcement, a court is forced to resort to circumventions (e.g., a request for counsel tied to a particular court appearance is not really a request for counsel's aid at other critical stages of the prosecution [*Boles*]; after some period of time the restraints of *Edwards* disappear even though the defendant has been held in continuous custody [*Hall*]) that really muddy the scope of the application of the *Edwards* rule. The Sixth Circuit's perceived need to find some rationale, however dubious, to avoid the consequences of the *Edwards* rule in situations such as that presented here

demonstrates the undesirability of holding that rule applicable in the first place.

The Eleventh Circuit at one time was firmly in the state's camp. *See Collins v. Francis*, 728 F.2d 1322, 1332-33 (11th Cir.), *cert. denied*, 469 U.S. 963 (1984), *reh'g denied*, 469 U.S. 1143 (1985):

> Collins' request for counsel at his arraignment did not place his request in the *Miranda/Edwards* fifth amendment right-to-counsel posture. . . .
>
> . . . .
>
> We think it clear that petitioner at no time indicated that he wished to take advantage of his fifth amendment right to silence or to counsel by asking that interrogation cease. Rather, petitioner indicated at arraignment that he desired counsel in the sixth amendment sense, to handle his case.

The ultimate holding in *Collins*, however, can no longer stand in light of this Court's decision in *Michigan v. Jackson*, for that holding permitted police-initiated interrogation *on the charged offense* after the invocation of the Sixth Amendment right to

counsel--interrogation that *Jackson* forbids. *See Cervi v. Kemp*, 855 F.2d 702, 706-07 n.11 (11th Cir. 1988). Whether the Eleventh Circuit, if confronted with the issue today, would still cling to its holding, quoted above, regarding the Fifth Amendment right to counsel is not clear.

The foregoing review of the decisions of other courts dealing directly with the issue presented, though certainly far from dispositive in this Court, supports the conclusion that the Wisconsin Supreme Court correctly decided this issue. The majority of state courts line up behind the Wisconsin Supreme Court and do so in decisions that contain extensive analyses of the issue leading to well-reasoned conclusions.

While the federal decisions are more evenly split, a number of them support the Wisconsin Supreme Court's decision. And an examination of the ones that do not, particularly the series of cases from the Sixth

Circuit, should give this Court real pause before it adopts the defendant's position. The fact that the Sixth Circuit has had to resort to dubious grounds to avoid the full impact of its adoption of the defendant's position sends a clear message as to the desirability of adopting that position in the first place.

The defendant apparently believes that the foregoing appeal to precedent from other jurisdictions is all beside the point. In his brief, he suggests that this Court has already "implicitly" decided the issue presented in its decisions and orders in *Wyrick v. Fields*, 459 U.S. 42 (1982); *Wolf v. United States*, 488 U.S. 807 (1988); and *Butler v. McKellar*, 110 S. Ct. 1212 (1990) (defendant's brief at 10, 26-29).

Contrary to the defendant's contention, *Wyrick* does not implicitly hold that the defendant there "invoked his [Fifth Amendment] right to counsel by retaining counsel"

(defendant's brief at 27). The question this Court was facing in *Wyrick*--whether special protection of the Fifth Amendment right to counsel is necessary in the context of a post-polygraph-test interview--was in no way dependent on there having been an invocation of the right to counsel. The analysis of that question that this Court undertook in *Wyrick* would have been necessary whether the defendant had invoked his right to counsel or not. One cannot legitimately find in that analysis an implicit finding that the defendant there had invoked his Fifth Amendment right to counsel by retaining counsel or otherwise.

Likewise, there was no implicit adoption of the present defendant's position in *Wolf*. In that case, which concededly involved a situation similar to that presented here, all this Court did was to remand the case to the Sixth Circuit Court of Appeals "for further consideration in light of *Arizona v.*

Roberson." 488 U.S. at 807. Such a disposition is not "a final determination on the merits." *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (footnote omitted). All "the lower court is being told [is] to reconsider the entire case in light of the intervening precedent--which may or *may not* compel a different result." R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* at 280 (6th ed. 1986) (emphasis supplied; footnote omitted). It certainly cannot be deemed an "implied" holding "that the request for appointed counsel at an arraignment triggers the *Roberson* rule," as the defendant contends (defendant's brief at 10).

Nor does *Butler v. McKellar* impliedly hold "that appearance with counsel at a bond hearing triggers the *Roberson* rule," as the defendant contends (*id.*). In *Butler*, this Court was directly presented with the issue whether the defendant's appearance with

counsel at a bond hearing constituted an invocation of the defendant's Fifth Amendment right to counsel that would trigger the *Edwards* rule as explicated in *Roberson*. *See Brief of Respondents* in *Butler v. McKellar*, No. 88-6677, at 33-45. This Court found it unnecessary to reach that issue, however. It was able to dispose of the case on the ground that *Roberson* was not to be applied retroactively on collateral review of the defendant's conviction. *Butler v. McKellar*, 110 S. Ct. at 1216-18.

Thus, review of the precedent the defendant cites reveals that, contrary to his contention, no decision of this Court has implicitly decided the issue presented. It must be resolved by examining the factors the state has surveyed in this brief: principle, perception, policy, perspicuity, and the precedent from other jurisdictions that has directly decided the issue. Such examination can result in only one conclusion:

a defendant who appears with counsel at a court hearing in a criminal prosecution does not thereby invoke his Fifth Amendment right to counsel.

CONCLUSION

For the reasons stated, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL MCNEIL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

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PRELIMINARY STATEMENT

The basis of petitioner's appeal is the right of an accused who has invoked the right to counsel at an initial appearance and remained in continuous custody to be protected from police initiated interrogation. There is no factual dispute that on May 22, 1987, McNeil made an appearance before a magistrate, that he had counsel at that hearing, and that Milwaukee County Sheriff Detective Joseph Butts initiated an interrogation of the petitioner just hours after petitioner had appeared with counsel. (Resp. Br. 1).[1]

Wisconsin and Amicus Curiae United States (herein after referred to as "United States") approach petitioner's appeal from different points of view. Wisconsin views the critical issue proposed by petitioner to be whether appearance with counsel at the magistrate's hearing invoked his Fifth Amendment right to counsel. (Resp. Br. 18). United States frames the issue much broader than that proposed by petitioner. United States poses the question whether "law enforcement officers may initiate custodial interrogation of a suspect who is represented by counsel on an unrelated offense." (Br. of United States as Amicus Curiae supporting Respondent, "U.S. Amicus Br. 1"). Framing the issue in such broad language allows the United States to argue to this Court *Maine* v. *Moulton*, 474 U.S. 159 (1989) which is not applicable. The

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[1] Respondent makes much of hearsay testimony from Detective Butts that petitioner's girlfriend informed Butts, while petitioner was in Omaha, but before he had turned himself into authorities, that petitioner wanted to talk with Butts. (R. 43-9). Caledonia authorities had been informed that McNeil was taken into custody on May 13, 1987. (R. 47-12). Consequently the girlfriend's statement was made at least 7 days prior to McNeil's contact with any Wisconsin police authorities, and in any event does not serve as evidence that petitioner initiated the interrogation of May 22, 1987.

issue of custody which is paramount in this case did not exist in *Moulton*. (U.S. Amicus Br. 6, 11). The issue before the Court is not whether an accused who is released on bail may be re-arrested and/or interrogated by police on unrelated charges even though he has counsel. The issue is whether the petitioner, who was in custody when he invoked his right to counsel at an initial appearance, may be subjected to police initiated interrogation while he remains in continuous custody.

Because of their differing approaches, the United States and Wisconsin argue at cross purposes when dealing with the issue of when a petitioner may invoke his right to counsel. Wisconsin asserts many times in its brief that a Fifth Amendment invocation of counsel may take place only within an interrogation context. (Resp. Br. 21-28). The United States, suggesting that petitioner invoked his Fifth Amendment right to counsel at his initial appearance only for the charged offense, nevertheless assumes that a suspect may invoke his Miranda right "not to be questioned outside the presence of counsel *at any time while he is in custody.*" (Emphasis Added) (U.S. Amicus Br. 14 n.5).

The contradictory approaches concerning when invocation of counsel may occur results in Wisconsin and the United States proposing different rules. Wisconsin proposes a bright-line rule that "an accused who appears with counsel at a court proceeding on a charged offense does not thereby invoke his Fifth Amendment right to counsel and consequently does not, at least in so far as unrelated, uncharged offenses are concerned, trigger the *Edwards* rule forbidding any further police initiated interrogation." (Resp. Br. 47-48). The United States, aware of the implication of its assumption that invoking Miranda rights can occur at any time when a suspect is in

custody, chooses form over substance proposing a rule that ignores previous decisions of this Court. See *Michigan* v. *Jackson*, 475 U.S. at 633 n.7; (Average person "should not be expected to articulate why or for what purposes he is seeking counsel."); *Arizona* v. *Roberson*, 486 U.S. 675 (1988) ("A suspect's request for counsel should apply to any question the police wish to pose follows from *Miranda* and *Edwards*."); *Minnick* v. *Mississippi*, 111 S.Ct. 486, 491 (1990) ("Officials may not reinitiate interrogation without counsel present whether or not the accused has consulted with his attorney."). United States rejects a bright-line rule and asks the Court to draw a line in this case that:

> "Where the suspect has done *no more* than request or accept representation on one charge, that conduct should be deemed to invoke the defendant's right to counsel for purposes of interrogation with respect to the charged offense, but not as to interrogation on other subjects." (U.S. Amicus Br. 15) (Emphasis Added).

Thus, United States suggests a case by case analysis to determine if an accused has invoked counsel for purposes of the *Roberson* rule.

Wisconsin, United States, and all Amicus Curiae (Illinois, Florida, Americans For Effective Law Enforcement, and Appellate Committee of the California District Attorney's Association) argue that petitioner's proposed rule would impede investigation of unsolved crimes without sufficient justification. Wisconsin and all Amicus Curiae fail to provide the Court with any authority for this assertion other than appeals to anecdotal authority (Ill. Amicus Br. 8) and "common sense." (Amicus Curiae Americans For Effective Law Enforcement Br. 7) (Resp. Br. 37). This repeated argument against bright-line rules

that law enforcement will be hindered was offered to this Court and rejected in *Edwards*, *Jackson*, *Minnick*, and *Roberson*, the case which requires reversal of the Wisconsin ruling below.

ARGUMENT

I. McNEIL'S CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT

A. Respondent Misinterprets This Court's Decision In *Michigan* v. *Jackson*.

The respondent puts forward what it calls a principled approach to determining whether or not petitioner has invoked his Fifth Amendment right to counsel. The principled approach that respondent offers is built on the foundation of when interrogation is taking place. "The request for counsel would have to be made by an in-custody suspect in response to the administration of the warnings prescribed in *Miranda* or in direct anticipation of, or during, interrogation." (Resp. Br. 23). This "principled" approach serves as respondent's analysis of the language in *Miranda* which says in part that "If, however, [the defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda* v. *Arizona*, 384 U.S. 436, 444-45 (1966). The United States apparently does not agree with respondent's "principle" and concedes that, "A suspect may invoke his right not to be questioned outside the presence of counsel at any time while he is custody (and therefore that petitioner could have invoked his Miranda rights for all purposes at the initial appearance on the armed robbery charge) . . . ." (U.S. Amicus Br. 14 n.5).

Presumably, if McNeil, upon his arrest had stated to the police prior to any intimation of interrogation from the

police that he wished to have an attorney, the police would have refrained from interrogating him and the respondent would not disapprove of the police non-interrogation. The respondent though is suggesting that a suspect who invokes his right to counsel before a magistrate should be treated differently from a suspect who invokes his right to counsel to a police officer. In support of its contention that the principle of interrogation should govern this case, the respondent scorns petitioner's reliance upon the well accepted principle of constitutional interpretation ". . . to give a broad, rather than narrow interpretation to a defendant's request for counsel." *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986), citing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). Respondent refers to this concept as "unprincipled." (Resp. Br. 49).[2] Indeed, this principle of constitutional interpretation was affirmed by this Court in *Connecticut* v. *Barrett*, 479 U.S. 523, 529 (1987), which respondent relies upon for its analysis of interpreting an ordinary person's view of a suspect's invocation of counsel. (Resp. Br. 28-30).

Respondent appears troubled that this settled principle of Constitutional analysis, as outlined in *Barrett* and *Jackson* ignores the differences between the Fifth and Sixth Amendments. (Resp. Br. 25). Contrary to respondent's fears, this Court has recognized the difference between Fifth and Sixth Amendment rights to counsel. This has not prevented the Court from applying a rule of one Amendment to a fact situation arising in the context of the other Amendment. See *Miranda* v. *Arizona*, 384 U.S.

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[2] Contra: The United States concedes that this is a principle: "It is true that this court has said that principles of waiver favor 'a broad, rather than a narrow interpretation to a defendant's request for counsel.'" (U.S. Amicus Br. 14).

475 (Applying Sixth Amendment standard of waiver to Fifth Amendment); *Patterson* v. *Illinois*, 487 U.S. 285, 299, n.12 (1988) (Utilizing Miranda warnings in a Sixth Amendment context: ". . . this Court has recognized that the waiver inquiry focuses more on the lawyer's role during questioning rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding."); *Michigan* v. *Jackson*, 475 U.S. 625 (Superimposing a Fifth Amendment analysis of *Edwards* onto the Sixth Amendment). In *Jackson* this Court put to rest respondent's "principled" approach that the invocation of the Fifth Amendment right to counsel can only occur in the context of interrogation. See *Michigan* v. *Harvey*, 110 S.Ct. 1176 (1990) ("Reasoning that 'the Sixth Amendment right to counsel at a post arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation,' the court in *Jackson* concluded that the *Edwards* protections should apply when a suspect charged with a crime requests counsel *outside the context of interrogation*"). (Emphasis Added).

The respondent's formulation that counsel can only be invoked in the Fifth Amendment context in response to Miranda warnings, or in direct anticipation, or during interrogation, is also meaningless. Most citizens presume that if they are arrested they are going to be subjected to police interrogation. Whether that interrogation takes place immediately, or at a later stage, is largely irrelevant. Most ordinary citizens would presume that the police, after having made an arrest, will at some time in the future, subject the arrestee to some form of interrogation. This presumption is based not only on the realities of the criminal justice system, but also on the media which bombards the public on a daily basis with newspaper

reports, movie and television crime shows portraying police and citizens in various stages of the criminal process where interrogation is commonly presented to the public as a critical endeavor. To assert as respondent does that the request for Fifth Amendment counsel pursuant to Miranda has to be made at least in direct anticipation of interrogation, if given its ordinary meaning, would mean that any request for counsel after arrest while in custody is in direct anticipation of interrogation.

Respondent asserts contrary to *Jackson*, that there is no basis for finding that a defendant invokes his Fifth Amendment right to counsel when he appears with counsel at a court hearing on a charged offense. (Resp. Br. 30). Respondent appears to reiterate what the State of Michigan argued to this Court in *Michigan* v. *Jackson*, U.S. at 632. In that case the State also relied on the factual differences between a request for counsel during custodial interrogation and the request for counsel at an arraignment. Respondent argues that the ordinary person would perceive that requesting counsel would be for seeking the assistance of counsel only as to the particular charge being prosecuted. (Resp. Br. 33). But the ordinary person that the respondent refers to is the average person noted by this Court in *Michigan* v. *Jackson*, U.S. at 633 n.7. The average person does not appreciate the subtle distinctions between the Fifth and Sixth Amendments. The average person who requests an attorney, either before a police officer or a magistrate, does not know which constitutional right he is invoking. The average person is not expected to articulate exactly why or for what purposes he is seeking counsel.[3]

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[3] The United States apparently agrees that this Court has "suggested than an accused 'should not be expected to articulate exactly why or for what purposes he is seeking counsel.'" (U.S. Amicus Br. 14).

This Court has unequivocally agreed that accused's request for counsel need not articulate as to why or for what purposes he is seeking counsel. The fact that the Michigan court made the observation that an average person does not understand the distinctions between the Fifth and Sixth Amendments, but decided that the Fifth Amendment had not been invoked in *Jackson* does not detract from the accuracy of that court's observation. This Court was well aware that the Michigan court had not found a Fifth Amendment invocation. *Jackson*, U.S. at 630 n.4. But the Michigan court's astute observation of the average person's undifferentiated request for counsel gave substance to the application of the *Zerbst* criteria (presumption against waiver of fundamental constitutional rights; *Zerbst*, U.S. at 464) in the *Jackson* case. This Court recognized that "When an accused requests an attorney either before a police officer or a magistrate he does not know which constitutional right he is invoking" was the ambiguity that triggered the "settled approach to questions of waiver that requires us to give a broad, rather than a narrow interpretation of a defendant's request for counsel." *Jackson*, supra at 633.

The United States asserts, "Nothing in *Jackson* suggests that a request for the appointment of counsel should be construed as an invocation of counsel not only with respect to the charged offense, but with respect to all possible subjects of interrogation as well." (U.S. Amicus Br. 17). This is not correct. The holding of *Jackson* was not so constricted:

> "We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Jackson*, U.S. at 636.

Of course, *Jackson* involved the Sixth Amendment in terms of how the case was presented and argued to the court. The defendant had been interrogated and convicted of the charge for which he appeared before a magistrate when he requested counsel. The analysis that led to the *Jackson* holding was grounded in part on the ambiguity of the assertion by the defendant of his right to counsel and whether that assertion was pursuant to the Fifth Amendment or the Sixth Amendment. This Court utilized the broad rather than narrow constitutional interpretation of a defendant's request for counsel. For the United States to argue that nothing in *Jackson* suggests that the request for appointment of counsel goes beyond the charge for which the petitioner made his appearance is to ignore the Court's analysis underlying its holding. What the United States suggests is that the petitioner has invoked his Fifth Amendment right to counsel, but the Fifth Amendment right to counsel should be limited to the charge for which he appeared. (U.S. Amicus Br. 15).

B. *Arizona* v. *Roberson* Mandates Reversal Of McNeil's Conviction.

Respondent does not directly deal with the rule of *Roberson*. (Resp. Br. 18 n.4). Respondent argues that *Roberson* is inapplicable based on its view of the petitioner's state of mind: "A defendant appearing with counsel at a court hearing on a particular charge would ordinarily view the invocation of the right to counsel implicit in such appearance as an invocation of the right to counsel that the Sixth Amendment affords to assist him in dealing with the State of that particular charged offense. He would not view it as an invocation of his right to counsel at interrogation on other uncharged offenses that Miranda affords." (Resp. Br. 41). This position rests on the mistaken notion that an ordinary person (unlike the *Jack-*

son court's characterization of the average person) understands the subtle distinctions between the Fifth and Sixth Amendments when appearing at an initial appearance or arraignment.

Respondent discusses *Roberson* indirectly by commenting that the *Edwards* rule was designed to protect an accused in police custody "from being badgered" by the police. (Resp. Br. 40). Quoting from the dissent in *Roberson*, the respondent notes that, "This court's concern in that regard [badgering] is that 'the suspect may believe his rights are fictitious if he must assert them a second time. *Arizona* v. *Roberson*, 486 U.S. at 690 (Kennedy, J. dissenting, but describing the majority's concern).'" (Resp. Br. 40-41). Respondent mistakenly believes that "badgering" is not a concern in the post-initial appearance context since the petitioner having appeared with counsel "knows" that he has counsel only for the charged offense. This is incorrect. The concern of badgering by law enforcement authorities is just as great, if not greater, at the post initial appearance phase of interrogation as it is at the pre-accusatory stages. As this court noted in *Minnick* v. *Mississippi:*

> "A single consultation with an attorney does not remove the suspect from *persistent attempts by officials* to persuade him to waive his rights, or from the *coercive pressures that accompany custody and that may increase as custody is prolonged.*" *Minnick*, S.Ct. at 491 (1990) (Emphasis Added).

In the present case, contrary to respondent's assertion that petitioner's invocation of counsel would overcome any suspicion that his right to counsel was fictitious, petitioner was precisely in the position of facing that prospect. He had been advised in Omaha of his Miranda rights. One of the rights read to him was as follows:

> "If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so choose." (J.A. 5).

Petitioner chose to remain silent and did not invoke his right to counsel at that time. Two days later though he did appear with counsel at an initial appearance. Under those circumstances, was it unreasonable for petitioner to presume that he was receiving the counsel that he was promised he could have if he wanted before he was interrogated? Did petitioner understand the subtle distinctions between the Fifth and Sixth Amendments when he appeared at his initial appearance and was offered the services of an attorney? Having accepted and appeared with counsel, petitioner was within hours confronted with a police initiated interrogation. Was it unreasonable that an average person such as petitioner would wonder whether the right to counsel which had just been conferred on him was more a promise than a reality?

The concern of the court in *Roberson* for a bright-line rule to provide clear and unequivocal guidelines to law enforcement is appropriate in the present case. The bright-line rule presented by the respondent is contrary to the well-settled principle of constitutional interpretation of invocation of rights.[4] Respondent's proposed rule would preclude courts from inquiring as to whether or not a defendant who had invoked his right to counsel had intended to invoke his Fifth Amendment right. Indeed, it would prevent a defendant at his initial appearance or arraignment from invoking his Fifth Amendment right.

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[4] "An accused who appears with counsel at a court proceeding on a charged offense does not thereby invoke his fifth amendment right to counsel and consequently does not, at least in so far as unrelated, uncharged offenses are concerned, trigger the *Edwards* rule forbidding any further police-initiated interrogation." (Resp. Br. 48).

The rule would result in the anomalous situation of the defendant having to wait until the police arrived to interrogate him before he could invoke his Fifth Amendment right even though he had previously appeared with counsel or requested counsel at an initial appearance or arraignment. Such a bright-line rule would effectively give the police more power to confer the right to counsel than that possessed by a magistrate or judicial officer.

The United States does not propose a bright-line rule, but rather a rule that would result in a case by case analysis as to whether or not a defendant had intended to invoke the *Roberson* rule when he had accepted or requested counsel at an initial appearance. This rule would create additional burdens for courts, defendants, police, and defense attorneys. The easiest situation to analyze would be one where defendant appears with counsel at an initial appearance. Counsel could invoke Fifth Amendment rights on behalf of his client. Many defense counsel would give such advice, but there would always be those who would not. If counsel did not advise his client that he should invoke his *Roberson* rights, counsel would face potential ineffectiveness of counsel proceedings. Police would have to discern from the record whether *Roberson* rights were invoked before initiating interrogations.

A more difficult situation arises with individuals who have been advised of their right to counsel, have requested counsel, but have not yet conferred with counsel. They would be at a distinct disadvantage from those defendants who make a first appearance with counsel. A proper approach would be for the magistrate to inquire at the initial appearance pursuant to *Michigan* v. *Jackson* whether the accused requesting counsel was invoking the Fifth and/or Sixth Amendment, and to make a satisfactory record that the defendant understood what were his Fifth and Sixth Amendment rights. A notation on the record would be required to allow the police to know whether or not the defendant had been so advised and whether he had made a knowing, intelligent and voluntary waiver of the Fifth Amendment right. In short, absence of petitioner's bright-line rule would result in numerous hearings and certain confusion amongst the various States and jurisdictions in administrating the rule proposed by United States.

Respondent and all Amicus Curiae minimize the central role that custody plays in applying Miranda and its progeny.[5] United States proposes that there is no material difference between a person who has been charged in one case and is a suspect in a second, and a person who is a suspect in both cases. (U.S. Amicus Br. 22). This ignores the consequences of being in custody as a result of being charged with an offense and being unable to post bail. A person who is a suspect in two cases has still not been formally charged and had bail set at an initial appearance, or been confined for any appreciable period of time. United States ignores this Court's admonition in *Minnick* that coercive pressures accompany custody and may increase as custody is prolonged. *Minnick*, Ante Page 10. United States ignores that petitioner had been in custody since May 13, 1987, and that bail had been set at $25,000.00 which effectively meant that petitioner would not be free from custody in the foreseeable future. Petitioner was incarcerated in the Milwaukee County Jail

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[5] "In subsequent decisions [after Miranda], the court specifically stressed that it is the *custodial nature* of the interrogation which triggers the necessity for adherence to the specific requirements of its Miranda holding." *Beckwith* v. *United States*, 425 U.S. 341, 346 (1976) (Emphasis Added) (Cites omitted).

governed by the rules of a typical holding institution. These rules dictated what petitioner could wear, what he could read, what he could eat, whom he could see and when he could see them, when he could make phone calls and from whom he could receive phone calls, when he could go to bed, who could interrogate him, (whether it was the Milwaukee County Sheriff, the Caledonia Police Department or the City of Milwaukee Police Department) and when such interrogations would take place. Any custody is a limitation of one's freedom. However, custody experienced by a charged defendant, who is a prisoner after bail has been set, is more severe than that faced by an uncharged suspect in a police station. To argue as United States does that having been charged in a separate case would not affect a person's susceptibility to coercive interrogation is to ignore the realities of post appearance detention.

United States suggests that representation by counsel on a separate case would make it easier rather than harder to invoke the right to counsel in response to Miranda warnings thereby negating the need for *Roberson* to be applied in the present situation. United States position is contrary to *Minnick* which noted with approval language from *Miranda:*

> ". . . [e]ven the preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process." *Miranda*, U.S. at 470; cited in *Minnick*, S.Ct. at 491.

Petitioner had appeared with counsel and remained in continuous custody. Officials should not have reinitiated interrogation without counsel present. *Minnick*, S.Ct. at 491.

The respondents and all Amicus Curiae argue that application of *Roberson* to the issue before the Court will

create significant costs for law enforcement,[6] and deprive suspects of an opportunity to clear up mistaken accusations and suspicions.[7] The arguments presented in the various briefs in support of these propositions are anecdotal and not substantiated by any studies or surveys. These arguments have been presented to and rejected by this Court in most of the key cases cited by the parties in their respective briefs: *Edwards*, *Roberson*, *Jackson*.

Adoption of petitioner's bright-line rule is not a negation of the balancing of benefits which is utilized by this Court in creating per se rules. Indeed, petitioner's proposed rule would have less impact on law enforcement than any previous per se rules adopted pursuant to *Miranda*, *Edwards* and *Roberson*. The number of defendants affected is certainly less after post-initial appearance interrogations than at station house interrogations. On the other hand, the duration and type of custody experienced by post-initial appearance defendants is more intense than that experienced by individuals who are initially entering the criminal justice process at the police station. The intense nature of the custody undergone by post-arraignment defendants resulting in increased coercive pressure is reason enough to give those defendants the same Fifth Amendment right given to suspects who have not yet been processed in the courts. The crucible of increased pressures of custody after requesting and/or appearing with counsel at an initial appearance or

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[6] (Resp. Br. 37), (U.S. Amicus Br. 20), (Amicus Appellate Committee of the California District Attorney's Association Br. 16).

[7] Amicus Illinois argues that suspects would be deprived of the ability to learn of new accusations. (Ill. Amicus Br. 9). This argument was presented by the United States in *Roberson* and was rejected by this Court. *Roberson*, U.S. at 687, also (AFELE Amicus Br. 7).

arraignment is sufficient to trigger the requirements of *Miranda-Roberson*. Nothing in petitioner's proposed rule detracts from this Court's principles in creating per se rules:

> "Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurance that the coercive pressures of custody were not the inducing cause. The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have declined to confine it in other instances. See *Arizona* v. *Roberson*, 486 U.S. 675 (1988)." *Minnick* v. *Mississippi*, S.Ct. at 492.

CONCLUSION

The judgment of the Wisconsin Supreme Court affirming McNeils conviction should be reversed.

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No. 90-5319

In the Supreme Court of the United States

OCTOBER TERM, 1990

PAUL MCNEIL, PETITIONER

v.

STATE OF WISCONSIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether law enforcement officers may initiate custodial interrogation of a suspect who is represented by counsel on an unrelated offense.

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In the Supreme Court of the United States

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No. 90-5319

PAUL MCNEIL, PETITIONER

v.

STATE OF WISCONSIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the police should be barred from initiating custodial interrogation of a suspect who is represented by counsel on a separate charge. The Court's resolution of this question will affect the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements by defendants in federal criminal prosecutions. In addition, the Court's disposition of this case will affect the admissibility in federal prosecutions of statements obtained by state and local law enforcement officers in circumstances similar to those in this case.[1]

[1] The issue presented in this case has arisen in several recent federal prosecutions. See *United States* v. *Hall*, 905 F.2d

STATEMENT

1. Petitioner was arrested in Omaha, Nebraska, pursuant to a criminal complaint and warrant charging him with an armed robbery in West Allis, Wisconsin. On May 20, 1987, while petitioner was in custody in the Omaha jail, two Milwaukee County, Wisconsin, deputy sheriffs, after advising petitioner of his *Miranda* rights, sought to question him. Petitioner declined to answer questions, but he did not invoke his right to counsel. The deputies promptly ended the interview. J.A. 5-6, 17.

On May 21, 1987, the deputies escorted petitioner from Omaha to Milwaukee. During the trip, the deputies advised petitioner that it would be to his advantage to tell his side of the story, but they did not attempt to question him. J.A. 17.

The next day petitioner appeared before a Milwaukee County Judicial Court Commissioner on the armed robbery charge. The Commissioner set bail and scheduled a preliminary hearing. Petitioner was represented at the initial appearance by an attorney from the public defender's office. J.A. 7-11. Later that evening, Detective Joseph Butts of the Milwaukee County Sheriff's Department visited petitioner in the Milwaukee County Jail. Detective Butts advised petitioner of his *Miranda* rights, and petitioner signed a waiver form. J.A. 12-13. Petitioner then said, "I guess you want to talk to me about this thing in Caledonia." Oct. 5, 1987, Tr. 14. Detective Butts replied that he did. The detective then proceeded to question petitioner about a murder and

959 (6th Cir. 1990), petition for cert. pending, No. 90-5706; *United States* v. *Wolf*, 879 F.2d 1320 (6th Cir. 1989); *United States* v. *Roberts*, 869 F.2d 70 (2d Cir. 1989); *United States* v. *Wright*, appeal pending, No. 90-30279 (9th Cir.).

burglary that had occurred in Caledonia, Wisconsin —offenses that were entirely separate from the West Allis armed robbery on which petitioner had been charged. *Id.* at 14-15.

Petitioner, who remained in custody, was questioned again by Detective Butts and other officers on May 24 and May 26 with regard to the Caledonia offenses. Petitioner was advised of his rights and signed a waiver form before each interrogation session. In the course of the questioning, petitioner confessed his involvement in the Caledonia murder and burglary. J.A. 17.

2. On May 27, 1987, the district attorney issued a criminal complaint charging petitioner with first degree murder, attempted first degree murder, and armed burglary in connection with the Caledonia incident. Petitioner moved to suppress his statements, but the trial court denied the motion. Thereafter, petitioner was convicted, on his plea of no contest, of being a party to the crimes of second degree murder, attempted first degree murder, and armed burglary.[2] He was sentenced to 60 years' imprisonment. J.A. 24.

On appeal, petitioner contended that his statements of May 22, 24, and 26 should have been suppressed. He argued that his appearance with counsel at the initial hearing on the armed robbery charge was an invocation of his right to counsel under the Fifth

[2] After his conviction, petitioner moved to withdraw his plea, arguing that his counsel had been ineffective in failing to cite *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117 (7th Cir. 1987), in support of the motion to suppress petitioner's statements. The trial court denied petitioner's post-conviction motion, concluding that its decision on the suppression motion "would have been the same even if that case [had] been argued." J.A. 15.

Amendment that precluded all further police-initiated interrogation concerning either the charged offense or any uncharged offense. The Wisconsin Court of Appeals certified the appeal to the Wisconsin Supreme Court. J.A. 16-22. The court of appeals noted that while "several United States Supreme Court cases offer a measure of direction on the resolution of this case, * * * none answers it completely." *Id.* at 21-22.

3. The Wisconsin Supreme Court upheld the trial court's denial of petitioner's suppression motion and affirmed petitioner's convictions. J.A. 23-45. The court recognized that the Fifth and Sixth Amendments afford "two distinct rights to counsel when a defendant is interrogated by the police." J.A. 27. As to the Sixth Amendment right, the court noted that petitioner had not been charged with the Caledonia murder or burglary at the time of the interrogations, and that his Sixth Amendment right to counsel therefore had not yet attached. The court explained that an invocation of the Sixth Amendment right with respect to a charged offense does not prohibit interrogation on other, uncharged offenses. J.A. 27-28.

The Wisconsin Supreme Court also rejected petitioner's contention that simply by appearing with counsel, petitioner had invoked his right not to be questioned on any subject without counsel. J.A. 30-33. Noting that a defendant at an initial appearance "is not being subjected to interrogation," the court concluded that "there is no fifth amendment right to counsel at an initial appearance." J.A. 30. The court stated that when a defendant has accepted the appointment of counsel at an initial appearance during which he is not subject to interrogation, "it is difficult to see what 'subtle compulsion' would exist if the police were to approach the defendant and seek to

interrogate him on an unrelated crime after providing a full warning of his *Miranda* rights, including the right to counsel." J.A. 31. The court concluded that "[t]he 'ordinary meaning' of a defendant's request for counsel at the initial appearance is only that he is invoking his sixth amendment right to counsel in the pending prosecution." J.A. 33 (quoting *Connecticut* v. *Barrett*, 479 U.S. 523, 530 (1987)).

Three justices dissented. J.A. 41-45. They saw no reason to "distinguish[] between a defendant who makes a request for assistance of counsel to a police officer while subject to a custodial interrogation and a defendant who makes a request for assistance of counsel to a magistrate and thereafter remains in continuous custody." J.A. 42. Accordingly, the dissenting justices concluded that after a defendant in custody accepts the appointment of counsel in connection with a charged offense, police officers may not thereafter seek to question him with respect to any crime, charged or uncharged. J.A. 42-43.

SUMMARY OF ARGUMENT

When petitioner was formally charged with armed robbery, his Sixth Amendment right to counsel attached with respect to that offense. Under this Court's decision in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), a defendant's request for the appointment of counsel on a charged offense is construed as an invocation of his Sixth Amendment right to counsel at all critical stages of the proceedings on that charge, including police interrogation. Moreover, under the rule the Court announced in *Jackson*, once the defendant requests the appointment of counsel, the police are prohibited from initiating further interrogation of the defendant or even seeking a waiver

of his right to counsel on the charged offense. But nothing in *Jackson* or any other decision of this Court bars police-initiated questioning of a represented defendant on unrelated offenses with which the defendant has not been charged.

1. The Sixth Amendment affords no basis for petitioner's claim. Petitioner's right to counsel under the Sixth Amendment attached only "at or after the initiation of adversary judicial criminal proceedings —whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). At the time of petitioner's interrogation, the State had not charged petitioner with murder, let alone initiated adversary judicial proceedings on that charge. Consequently, petitioner's Sixth Amendment rights as to that offense had not attached. Although petitioner's Sixth Amendment rights *had* attached as to the armed robbery with which he had been charged, this Court has never held that the commencement of adversary proceedings on one charge bars law enforcement officers from questioning the defendant concerning uncharged offenses. On the contrary, the Court has said that excluding evidence pertaining to charges as to which the Sixth Amendment right has not attached, merely because other charges were pending, would "unnecessarily frustrate the public's interest in the investigation of criminal activities." *Maine* v. *Moulton*, 474 U.S. 159, 180 (1985). See also *Moran* v. *Burbine*, 475 U.S. 412, 431 (1986).

2. Petitioner seeks to achieve precisely the result that the Court rejected in *Moulton* and *Burbine* by arguing that acceptance of counsel on a charged offense is sufficient to bar all subsequent police-initiated custodial interrogation concerning any unrelated offense, no matter how remote from the charged offense. He relies on *Edwards* v. *Arizona*, 451 U.S. 477 (1981), in which this Court adopted a prophylactic rule that forbids police from approaching a suspect who has invoked his right to counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in an effort to obtain a waiver of that right. *Edwards* and its progeny, however, do not require the kind of blanket prohibition on police investigation that petitioner seeks in this case.

The Court has emphasized that the prophylactic rule of *Edwards* protects the individual's right to choose whether to speak with law enforcement officers. Accordingly, the accused must "actually invoke[] his right to counsel." *Smith* v. *Illinois*, 469 U.S. 91, 95 (1984) (per curiam). Petitioner's mere appearance with counsel at a court proceeding on the West Allis armed robbery charge should not be construed as an invocation of his Fifth Amendment right to counsel at subsequent interrogations on unrelated offenses. Nothing about petitioner's decision to be represented by counsel in connection with the armed robbery charge suggests that he also wished to invoke his right not to be questioned in the absence of counsel with respect to wholly separate matters. More generally, there is nothing about the decision to be represented by counsel in a pending criminal case that would justify a conclusive presumption that such a decision is equivalent to a request for counsel in connection with any future custodial interrogation on any subject.

Neither *Michigan* v. *Jackson* nor *Arizona* v. *Roberson*, 486 U.S. 675 (1988), requires a different result. *Jackson* applied the rule of *Edwards* in the Sixth Amendment context. Because petitioner's Sixth Amendment rights on the murder charge had not at-

tached at the time of the interrogation, *Jackson* does not apply to this case. In *Roberson*, the suspect unquestionably invoked his right to counsel under *Miranda* v. *Arizona* by stating that he "wanted a lawyer before answering any questions." 486 U.S. at 678. The only question in that case was whether that invocation of the *Miranda* right should be applied only to the offense that was the subject of the questioning or, instead, to any police efforts to question the suspect while he was in custody. Although the Court decided that the policies underlying the Fifth Amendment and the *Miranda* decision require the broader construction, that conclusion does not suggest that a defendant who accepts or requests legal representation in a criminal case must be deemed to have invoked his right to counsel with respect to custodial interrogation on any subject.

Finally, the balance of costs and benefits does not justify the creation of a new prophylactic rule to prohibit all custodial interrogation whenever a suspect is a defendant in a criminal case. The cost of the rule petitioner advocates would be high: the rule would exclude from evidence reliable statements obtained during custodial interrogation of suspects on any subject, as long as the suspects were charged and represented in connection with some crime in some jurisdiction at the time of the interrogation. By contrast, the benefit of the rule in protecting against coercive interrogation tactics would be negligible. The fact that a person has been charged with and is represented in connection with an unrelated crime is not likely to make that person more vulnerable to the coercive effects of custodial interrogation than a person who is merely a suspect as to the unrelated offense.

ARGUMENT

THE COURT SHOULD NOT CREATE A PER SE RULE AGAINST POLICE-INITIATED INTERROGATION OF SUSPECTS WHO ARE REPRESENTED BY COUNSEL ON AN UNRELATED CHARGE

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. To counteract those pressures, the Court devised a set of prophylactic rules intended to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Id.* at 469. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court announced an additional prophylactic rule for cases in which the suspect invokes his right to have counsel present during custodial interrogation. The Court held that, following such a request, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. Most recently, in *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990), the Court has construed the rule of *Edwards* to bar police reinitiation of questioning even after the suspect has had an opportunity to consult with counsel.

Petitioner asks the Court to create a new prophylactic rule in this case that would extend the per se rule of *Edwards* to prohibit law enforcement officers from questioning a suspect who has accepted the appointment of counsel to represent him on unrelated charges. We submit that such a rule would be un-

warranted under both this Court's precedents and the general principles of interrogation law.

1. As an initial matter, the interrogation in this case plainly did not violate petitioner's Sixth Amendment rights.[3] The right to counsel afforded by the Sixth Amendment attaches only "at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). See also *Moran* v. *Burbine*, 475 U.S. 412, 428 (1976) (Sixth Amendment attaches at "the first formal charging proceeding"). That principle is consistent with the "core purpose" of the Sixth Amendment right to counsel, which is to ensure the assistance of counsel at trial and at critical pretrial proceedings in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984).

At the time of his interrogation, petitioner's Sixth Amendment right to counsel on the Caledonia murder and burglary offenses had not yet attached. Not only had there been no adversary judicial proceedings concerning those offenses, but the State had not even

[3] Petitioner implicitly concedes as much by framing his argument exclusively in Fifth Amendment terms. His petition states the question presented as whether a suspect's initial appearance with counsel "on a charged offense of armed robbery [was] an invocation of [petitioner's] *fifth amendment* right to counsel that precluded police initiated interrogation on an unrelated, uncharged homicide * * *." Pet. i (emphasis added). See also Pet. Br. i.

arrested petitioner for the murder or burglary.[4] Petitioner had been charged with an unrelated armed robbery, and he had made an initial court appearance with counsel on that charge. Consequently, petitioner's Sixth Amendment rights had attached with respect to the charged offense. And under this Court's decision in *Michigan* v. *Jackson*, 475 U.S. 625 (1980), petitioner's acceptance of appointed counsel at his initial court appearance on the armed robbery charge prohibited subsequent interrogation on the charged offense. But this Court has never held that a defendant's assertion of the Sixth Amendment right to counsel extends to uncharged, unrelated offenses. On the contrary, the Court has said that interrogation concerning uncharged offenses does not violate a suspect's Sixth Amendment right to counsel, even though the suspect has been charged with other crimes.

In *Maine* v. *Moulton*, 474 U.S. 159 (1985), for example, the Court said:

> To exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was ob-

[4] Petitioner asserts that a Caledonia police officer "had in his own estimate sufficient information" to arrest petitioner for the murder prior to the interrogations, Pet. Br. 3, and had filled out a felony warrant request (but had not submitted it to the District Attorney's Office) four days before petitioner's court appearance on the armed robbery charge. *Id.* at 5. The police officer's actions plainly did not mark the beginning of adversary judicial proceedings on the murder charge. This Court "has never held that the [Sixth Amendment] right to counsel attaches at the time of arrest." *United States* v. *Gouveia*, 467 U.S. at 190. *A fortiori*, the Sixth Amendment right to counsel does not attach when an individual police officer forms the belief that there is sufficient information to seek an arrest warrant.

> tained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. * * * Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.

Id. at 180 & n.16. See also *Moran* v. *Burbine*, 475 U.S. at 431 (government may not interrogate defendant out of the presence of counsel on a charged offense, but is free to obtain evidence regarding an uncharged offense "in precisely the same manner from the identical suspect"); *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964) (proper for government to continue investigation of suspected drug ring following indictment of defendant, although defendant's incriminating statements cannot be admitted against him at the trial on the charged offense).

2. Petitioner contends that his initial appearance with counsel should be treated as an invocation of his Fifth Amendment privilege against compulsory self-incrimination, and in particular his right under *Miranda* not to be questioned without counsel even with respect to uncharged offenses. In practice, the new prophylactic rule that petitioner proposes would result in precisely the same frustration of "the public's interest in the investigation of criminal activities" that the Court referred to in *Moulton*. 474 U.S. at 180. That cost might be justified if petitioner's proposed rule significantly advanced or protected Fifth Amendment interests. But the rule would not have that effect.

a. The "fundamental purpose" of the prophylactic rules adopted in *Miranda* and *Edwards* is "to assure

that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process." *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987) (quoting *Miranda*, 384 U.S. at 469) (emphasis added by Court in *Barrett*). In keeping with that fundamental purpose, the Court has made clear that the Fifth Amendment privilege against compulsory self-incrimination and the related right, recognized in *Miranda*, to have counsel present during custodial interrogation are not self-executing. See *Moran* v. *Burbine*, 475 U.S. at 433 n.4 (*Miranda* did not "creat[e] an undifferentiated right to the presence of an attorney that is triggered automatically by the initiation of the interrogation itself"). Instead, a basic requirement for application of the *Edwards* rule is that the accused must "actually invoke[] his right to counsel" by "stat[ing] that he wants an attorney." *Smith* v. *Illinois*, 469 U.S. 91, 95 & n.2 (1984) (per curiam). See also *Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10 (1975).

Nothing about petitioner's routine appearance with counsel at the initial hearing on the armed robbery charge suggests that petitioner actually "consider[ed] himself unable to deal with the pressures of custodial interrogation without legal assistance," *Arizona* v. *Roberson*, 486 U.S. at 683 (stating the test for an invocation of the right to counsel in the interrogation setting). Neither petitioner nor his counsel said anything at that proceeding with respect to interrogation. *Michigan* v. *Jackson*, of course, treats a request for representation by counsel as a bar to police-initiated post-indictment interrogation with respect to the charged offense, but that is because a defendant's decision to be represented by

counsel is interpreted to reflect a desire to be represented by counsel at every critical phase of *that case*.[5]

The fact that petitioner apparently chose to be represented by counsel on the robbery charge cannot be treated as an invocation of his Fifth Amendment rights as to uncharged and unrelated offenses.[6] It is true that this Court has said that principles of waiver favor "a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Michigan* v. *Jackson*, 475 U.S. at 633. The Court has also suggested that an accused "should not be expected to articulate exactly why or for what purposes he is seeking counsel." *Id.* at 633 n.7 (quoting *State* v. *Jackson*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). But that statement does not mean that the

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[5] This case does not turn on whether a suspect may invoke his right to counsel at interrogation only after law enforcement officers read him the *Miranda* warnings and ask whether he is willing to answer questions. Assuming that a suspect may invoke his right not to be questioned outside the presence of counsel at any time while he is in custody (and therefore that petitioner could have invoked his *Miranda* rights for all purposes at the initial appearance on the armed robbery charge), petitioner never indicated in any way that he wanted counsel to be present during any or all subsequent custodial questioning on unrelated offenses.

[6] The record shows only that petitioner appeared with counsel at his initial hearing. While there is no indication that petitioner explicitly requested representation, we have treated petitioner's apparent acceptance of counsel for purposes of the initial appearance as legally equivalent to an affirmative request to be represented by counsel at least for purposes of that proceeding, and we accept, *arguendo*, that petitioner's election to be represented at the initial appearance should be treated as legally equivalent to the request for representation made by the defendant in *Jackson*.

invocation of the right to counsel for one purpose invariably constitutes the invocation of the right to counsel for all purposes.

The Court invariably faces a line-drawing problem in deciding how broadly to construe conduct that evinces a desire for legal representation. In the context of this case, we submit that the line should be drawn as follows: where the suspect has done no more than request or accept representation on one charge, that conduct should be deemed to invoke the defendant's right to counsel for purposes of interrogation with respect to the charged offense, but not as to interrogation on other subjects.

As this Court has recognized, there are significant differences between representation by counsel after the government has initiated formal adversary proceedings and representation at custodial interrogation before adversarial proceedings commence. "[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively (including the accused), object to improper prosecution questions, and much more." *Patterson* v. *Illinois*, 487 U.S. 285, 299 n.13 (1988). In contrast, the Court has noted, the " 'dangers and disadvantages of self-representation' during questioning are less substantial and more obvious to an accused than they are at trial," and "the role of counsel at questioning is relatively simple and limited." *Id.* at 299 (quoting *Faretta* v. *California*, 422 U.S. 806, 835 (1975)). Thus, an accused might well request or accept representation on pending charges without feeling in any way unequal to the task of answering questions from the police on unrelated, uncharged offenses. And since the dangers and disadvantages of self-repre-

sentation during questioning are relatively obvious, the reasons for construing requests for counsel broadly are far less persuasive in this context.

A suspect who is represented by counsel on pending charges, like other suspects in custody, needs no technical legal knowledge about the scope of his Fifth and Sixth Amendment rights in order to decide, after hearing the *Miranda* warnings, whether he wishes to answer questions concerning an unrelated offense. Indeed, a suspect without specialized legal knowledge would likely be surprised to be told that by retaining or accepting the appointment of counsel on a charged offense, he is presumed as a matter of law to have indicated that he feels unable to answer questions from law enforcement officers concerning uncharged and unrelated offenses. For that reason, a suspect who is represented by counsel in another case is not likely to feel that he is being badgered, or that his invocation of rights has been disregarded, if the police later give him the *Miranda* warnings and seek to question him about unrelated matters. *Cf. Michigan* v. *Harvey*, 110 S. Ct. 1176, 1180 (1990); *Arizona* v. *Roberson*, 486 U.S. at 686 & n.6.

Petitioner's simple acceptance of counsel on the armed robbery charge provided no meaningful indication that he felt himself unable to answer questions concerning uncharged offenses without an attorney. Before questioning petitioner, the officers advised him of his right to counsel, and he waived that right. Because petitioner made no request that he not be interrogated without an attorney, the interrogation did not violate his right to remain silent or his right to counsel.[7]

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[7] Petitioner suggests (Pet. Br. 17-18) that his refusal to make a statement to the officers who escorted him from Omaha to Milwaukee, see J.A. 5-6, supports his claim that he later invoked his Fifth Amendment right to counsel. Contrary to petitioner's suggestion, his earlier request to remain silent was not a request for counsel and did not preclude the police from seeking to reinitiate questioning two days later. See *Michigan* v. *Mosley*, 423 U.S. at 104 n.10 (1975) (*Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.'" (quoting *Miranda*, 384 U.S. at 474)).

b. This Court's decision in *Michigan* v. *Jackson*, *supra*, does not require a different result. *Jackson* held that the rule of *Edwards* prohibiting further police-initiated custodial interrogation following a request for counsel applies "when the basis for the claim is the Sixth Amendment." 475 U.S. at 636. The Court expressly declined to consider whether a defendant's request for counsel at an arraignment or similar proceeding also implicates his rights under the Fifth Amendment and *Miranda*. *Id.* at 630 n.4. Because petitioner's Sixth Amendment rights with respect to the uncharged offenses about which he was interrogated had not attached when he made the statements at issue here, *Jackson* does not govern this case. The Court in *Jackson* stated that a defendant's request for the appointment of counsel at his arraignment should be presumed to be a request for the lawyer's services at all critical stages of the prosecution, including subsequent custodial interrogation. 475 U.S. at 633. That proposition, however, is limited, by the Sixth Amendment rationale of the case, to interrogation regarding the charged offense. Nothing in *Jackson* suggests that a request for the appointment of counsel should be construed as an invocation of counsel not only with respect to the

charged offense, but with respect to all other possible subjects of interrogation as well. Cf. *Arizona* v. *Roberson*, 486 U.S. 675, 685 (1988) (Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a *particular* crime and thus is facing a state apparatus that has been geared up to prosecute him") (emphasis added).[8]

c. Nor is this Court's decision in *Arizona* v. *Roberson*, 486 U.S. 675 (1988), dispositive here. In *Roberson*, the Court extended the *Edwards* rule to interrogations conducted in the course of separate investigations. The important difference between this case and *Roberson* is that the defendant in *Roberson*, after being advised of his *Miranda* rights, replied that he "wanted a lawyer before answering any questions." 486 U.S. at 678. The defendant thus plainly invoked his right to have counsel present at any custodial interrogation. The Court concluded that this invocation should not be construed as "investigation-specific;" rather, it applied to "any questions the police wish[ed] to pose." *Id.* at 684. That conclusion

[8] Petitioner's reliance (Pet. Br. 24-25) on *Wyrick* v. *Fields*, 459 U.S. 42 (1982), is misplaced. The defendant in *Fields* was a soldier who had been arrested on a charge of rape. After retaining counsel, he requested that the military authorities conduct a polygraph examination. *Id.* at 43-44. The Court concluded that by requesting a polygraph examination, Fields had "initiated interrogation," and that he had made a valid waiver of the right to have counsel present during the examination and subsequent questioning. *Id.* at 47-49. The Court in *Fields* declined to address any issue arising under the Sixth Amendment, see 459 U.S. at 49, and nothing in its analysis of *Edwards* provides any support for petitioner's claim. The Court simply found that under all the circumstances, Fields had validly waived his right to the presence of counsel at interrogation. 459 U.S. at 47.

rested on the Court's view that a suspect, having once expressed his "unwillingness to answer any questions without the advice of counsel," *ibid.*, was unlikely to change his mind in the context of a different investigation. Here, in contrast, petitioner's acceptance of representation by counsel at the initial hearing on the armed robbery charge—unlike Roberson's statement that he "wanted a lawyer before answering any questions"—revealed nothing about his discomfort with the pressures of custodial interrogation. See *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) (*Edwards* and its progeny preserve the integrity of a suspect's choice to communicate with police only through counsel, but do not bar a suspect from making an initial choice as to whether he wishes to answer questions on his own).[9]

d. A principal concern of the Court in *Roberson* was the need for a bright-line rule to provide " 'clear and unequivocal' guidelines to the law enforcement profession." 486 U.S. at 681-682. That concern does not require the creation of a new prophylactic rule to address the circumstances of this case. Here, the Sixth Amendment, as augmented by *Michigan* v. *Jackson*, provides a bright-line rule: Once the ac-

[9] Contrary to petitioner's suggestion (Pet. Br. 26), the Court in *Butler* v. *McKellar*, 110 S. Ct. 1212 (1990), did not make an "implied finding" that the defendant in that case invoked his Fifth Amendment right to counsel by appearing with his attorney at a bond hearing. The only question before the Court in *Butler* was whether the rule announced in *Roberson* would be applied retroactively to cases on collateral review. 110 S. Ct. at 1216-1218. In any event, the Court stated that "[*a*]*fter* invoking his Fifth Amendment right to counsel, Butler retained counsel who appeared with him at a bond hearing on August 31, 1980." *Id.* at 1214 (emphasis added).

cused has requested or obtained counsel to represent him on a charged offense, the police may not initiate custodial interrogation concerning that offense. With respect to uncharged offenses, however, the accused remains in precisely the same position as any other suspect in custody.[10]

3. Because the prophylactic rules of *Miranda* and *Edwards* "sweep[] more broadly than the Fifth Amendment itself," *Oregon* v. *Elstad*, 470 U.S. 298, 306-307, 309 (1985), the Court has carefully weighed the benefits of creating such per se rules against the costs of restricting police investigations and excluding from evidence some voluntary confessions. See *Duckworth* v. *Eagan*, 109 S. Ct. 2875, 2883 (1989) (O'Connor, J., concurring); *New York* v. *Quarles*, 467 U.S. 649, 657 (1984); *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974). In this situation, the costs of creating a new prophylactic rule as an extension of *Edwards* outweigh any benefits such a rule might confer.

The costs of barring interrogation of all suspects in custody who are represented by counsel on other charges would be significant. This Court has recognized that "[a]dmissions of guilt are more than

[10] Moreover, applying *Edwards* in this context would not result in a perfectly bright line. In a recent decision, for example, the Court of Appeals for the Sixth Circuit assumed without deciding that *Edwards* applies where a suspect requests counsel on a charged offense, the charges are then dismissed (leaving no lawyer to consult), and police officers thereafter initiate custodial interrogation concerning an unrelated offense. *United States* v. *Throneburg*, No. 89-2111 (Dec. 17, 1990). Similar questions about the scope of *Edwards* would arise if the defendant were convicted of a charged offense, and then pursued a direct appeal or collateral attack on his conviction, or if the defendant were represented by counsel in civil litigation with the government.

merely 'desirable' * * *; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. at 426. If a defendant is not released on bail, the rule petitioner proposes would bar law enforcement officers from questioning him on any subject until after the trial. If the defendant is convicted, he is likely to remain in custody, and he may continue to be represented by counsel on appeal and perhaps during a collateral attack on his conviction. Consequently, a decision reversing the Wisconsin Supreme Court would effectively insulate many individuals charged with or convicted of one crime from any police-initiated interrogation concerning other wholly unrelated crimes for months or even years. Presumably, that principle would apply not only to crimes committed before the suspect was incarcerated, but to crimes committed during the period of his incarceration as well. Because many offenders commit multiple crimes, and because it is not unusual for a person under suspicion in connection with one offense to be a represented defendant in a separate case in the same or another jurisdiction, a rule that pulled the curtain down on all police-initiated custodial interrogation of such persons would impose a very great cost in restricting law enforcement efforts.

On the other side of the balance, it is hard to identify any significant benefits that would flow from petitioner's proposed rule. To be sure, petitioner's rule would reduce somewhat the risk of admitting statements from suspects who were subtly coerced into making them. But any per se rule barring some class of inculpatory statements would have that effect. The relevant inquiry is whether admitting

statements in a case such as this one would permit the police to overcome a suspect's expressed desire not to submit to interrogation without counsel. We do not believe it would. For purposes of determining the coercive effect of custodial interrogation, there is no material difference between a person who has been charged in one case and is a suspect in a second, and a person who is a suspect in both cases.

The fact that the first person had been charged in a separate case would appear to have little or nothing to do with that person's susceptibility to the coercive effects of custodial interrogation, and thus his need for greater safeguards than those provided by the procedures spelled out in *Miranda*. In fact, a suspect who is represented by counsel in a separate case may find it easier, rather than harder, to invoke the right to counsel in response to *Miranda* warnings, since that suspect already has a lawyer in another matter and can simply insist on that lawyer's assistance before questioning in connection with the separate, uncharged offenses under investigation. In that setting, there is no unfairness in treating the separately represented suspect the same as the unrepresented defendant and admitting any statements he makes after validly waiving his rights to silence and to the presence of counsel during questioning.

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted.

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No. 90-5319

In The
Supreme Court of the United States
October Term, 1990

PAUL McNEIL,
Petitioner,

— against —

STATE OF WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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No. 90-5319

In The
Supreme Court of the United States
October Term, 1990

PAUL McNEIL,
Petitioner,

— against —

STATE OF WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal, and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America,

consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting interrogations within the bounds of the law, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

THE DEFENDANT'S ACCEPTANCE OF THE ASSISTANCE OF COUNSEL AND APPEARANCE WITH COUNSEL AT AN INITIAL HEARING ON THE CHARGED OFFENSE DID NOT CONSTITUTE AN INVOCATION OF THE FIFTH AMENDMENT RIGHT TO COUNSEL THAT PRECLUDED POLICE INITIATED INTERROGATION ON AN UNRELATED, UNCHARGED OFFENSE WHILE DEFENDANT WAS IN CONTINUOUS CUSTODY.

Amici will not discuss at length the case law analysis of the parties in this case. Instead, we will concentrate upon policy issues raised in it and our need as law enforcement administrators and concerned members of Society to (1) ensure that the police receive adequate, understandable court guidance as to what is, and what is not, legally permissible in their interrogations of criminal suspects, and (2) to call attention to the practical and endangering difficulties that would ensue if this Court were to adopt the contention made by the defendant.

The Supreme Court of Wisconsin ruled that the acceptance by Petitioner ("defendant") of the assistance of counsel and appearance with counsel at his initial court appearance did not amount to an invocation of the Fifth Amendment right to counsel that would, under the rule in *Edwards v. Arizona,* 451 U.S. 477 (1981), bar subsequent police-initiated interrogation on an unrelated, uncharged offense while the defendant remained in custody. *State v. McNeil,* 155 Wis.2d 24, 454 N.W.2d 742 (1990).

It is now clear that when a suspect whom the police wish to subject to custodial interrogation invokes his right to counsel, under the rule in *Edwards* any further police-initiated questioning about the charged offense is a violation

of the prophylactic rule laid down by this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966). However, a question that has often been raised after *Edwards* has been whether the bar applies to police interrogations about other crimes, different from the ones that were the focus of the original interrogation.

The lower courts have been divided on this issue. Compare *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117 (7th Cir. 1987) (yes), and *State v. Preston,* 555 A.2d 360 (Vt. 1988) (yes), with *Butler v. Aiken,* 846 F.2d 255 (4th Cir. 1988) (no: rule of *Roberson* held not retroactively available. 490 U.S. ____, 108 L.Ed.2d 347). The United States Supreme Court resolved this issue in *Arizona v. Roberson,* ___ U.S. ___, 108 S.Ct. 2093 (1988), in favor of accused persons, but did so in the context of the Fifth Amendment right to counsel (stationhouse interrogation) rather than the Sixth Amendment right to counsel (interrogation after the commencement of judicial proceedings).

In *Roberson* this Court laid down a rule prohibiting police-initiated questioning regarding any criminal conduct after a defendant had invoked his Fifth Amendment right to counsel in the interrogation process. The *Edwards* rule was to apply, the Court made clear, even when a different law enforcement officer seeks to question the suspect about a different crime without knowing that the suspect previously requested counsel in the interrogation process. The *Roberson* Court reasoned that once the suspect requests counsel, he has indicated clearly that he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney." The Court noted that "there is no reason to assume that a suspect's state of mind is in any way investigative-specific."

The *Roberson* Court made two clear distinctions for situations *not* covered by its ruling.

The *first* was the situation where a suspect in custodial interrogation has invoked his Fifth Amendment right to *silence* under *Miranda*, as opposed to his right to *counsel*. The Court had previously ruled in *Michigan v. Mosley*, 423 U.S. 96 (1975), that police re-initiation of questioning about a separate crime, could still be consistent with the obligation to "scrupulously honor" a suspect's right to terminate questioning. This distinction simply carries forward the rule adopted in *Mosley* and prevents *Roberson* from being in conflict with *Mosley*.

The *second* distinction, which is relevant to the instant case, pertained to the situation where a suspect's Sixth Amendment right to counsel had attached upon the initiation of the formal adversary process, but the suspect's Fifth Amendment right to counsel under *Miranda* had not yet attached because the suspect was not in custody and presently subjected to police interrogation. This distinction was intended to cover the situation first illustrated in *Massiah v. United States*, 377 U.S. 201 (1964), and most recently applied by this Court in *Illinois v. Perkins*, ___ U.S. ___, 110 S.Ct. 2394 (1990).

Roberson is limited to those situations where a suspect in custody has invoked the *Fifth Amendment* right to counsel under *Miranda*.

Amici further note that this Court's very latest pronouncement on the subject in *Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. ___, 48 CrL 2053 (December 3, 1990), in which the Court ruled that once a suspect in custody has invoked his Fifth Amendment right to counsel, thus triggering the rule in *Edwards*, he cannot be interrogated again in the absence of counsel (unless the suspect initiates the interrogation process) regardless of whether the suspect has consulted with an attorney in the meantime, is also consistent with this parallel development and works no change in it.

The Wisconsin Supreme Court correctly refused to take the *Roberson* rule beyond its express Fifth Amendment application, "to include extension of the sixth amendment invocation of [the] right to counsel to shield the defendant from postarraignment interrogation on unrelated charges." 454 N.W.2d at 748. It joined several other courts in reaching this conclusion on similar facts, including the Supreme Court of Michigan in *People v. Crusoe*, 433 Mich. 666, 449 N.W.2d 641 (1989).

This distinction, *amici* submit, is also grounded on common sense realities. A request for counsel at an initial court appearance, as opposed to during police interrogation, signifies only that the defendant wants counsel for that particular offense. This right is clearly accorded to him by the Sixth Amendment and, as applied, fortifies him from any further police interrogation with respect to the particular crime for which he has been charged and arraigned. However, even as to that crime, the defendant has the privilege of refusing further legal representation at trial, and of even rejecting legal representation that might avoid imposition of the most severe sanction that Society can apply—the death penalty. *Gilmore v. Utah*, 429 U.S. 1012 (1976).

Moreover, an accused person, in exercising his right to counsel regarding the charged offense, might not even be considering other offenses he may have committed, or for which he might be charged. Indeed, he might not even want his own attorney to know about them, since that might diminish counsel's enthusiasm for effective representation at trial on the present charge.

It is also conceivable that with regard to other offenses a suspect may harbor the thought that he will be able to explain away the suspicion of guilt as to them, on the basis of self-defense, alibi, or mistaken identification. In other words, as to those offenses a presently charged offender may

exonerate himself to the police without being charged and having to stand trial. *Amici* further note that a large percentage of criminal offenders have committed other crimes. As to these, the police should not be foreclosed from questioning about such other offenses.

Amici submit that to accept the contention of the defendant in this case would amount to an immunization of a substantial percentage of criminal offenders from *any* questioning by the police. There are in fact enough such protections presently available to them; the public safety decries the erection of additional ones. As Justice Potter Stewart stated in *Michigan v. Mosley, supra,* at 103: "A blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation would transform *Miranda* safeguards into wholly irrational obstacles to legitimate investigative activity."

As some have noted, the cost of maintaining *Miranda* has been very high for the administration of justice in America. Inbau and Manak, "Miranda v. Arizona—Is It Worth The Cost? (A Sample Survey With Commentary of the Expenditure of Court Time and Effort)," 24 Cal. West. L. Rev. 185 (1988). We see no need to enlarge the scope of that decision as defendant would have this Court do in this case.

CONCLUSION

Once again evidence has been presented of the adverse impact of *Miranda v. Arizona* on trial courts and the many appellate courts which should be spared the diversion of their primary responsibility of making reasonably possible the conviction of the guilty and affording adequate protection to the *innocent*. Overzealousness in implementing the prophylactic rules of *Miranda*, as would be true in the present case setting, should be discouraged by this Court. Beyond that, we respectfully suggest that there be a modification to

Miranda's mandate by simply requiring that persons in police custody be warned of the right to remain silent (period!). **At the very least, this Court should not add to the confusion by entertaining the defendant's argument for blurring the distinctions that presently exist between the Fifth and Sixth Amendment rights to counsel.**

Respectfully submitted,

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Case No. 90-5319

IN THE
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Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

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*The States joining in this brief are listed in Appendix A of this brief.

QUESTION PRESENTED

WAS THE PETITIONER PAUL MCNEIL'S ACCEPTANCE OF ASSISTANCE OF COUNSEL AND APPEARANCE WITH COUNSEL AT AN INITIAL APPEARANCE ON A CHARGED OFFENSE OF ARMED AND MASKED ROBBERY AN INVOCATION OF MCNEIL'S FIFTH AMENDMENT RIGHT TO COUNSEL THAT PRECLUDED POLICE INITIATED INTERROGATION ON AN UNRELATED, UNCHARGED HOMICIDE WHILE THE ACCUSED WAS IN CONTINUOUS CUSTODY?

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INTEREST OF AMICI CURIAE

The states joined herein as amici curiae have a compelling interest in the outcome of this case, as it has the potential to significantly and adversely affect law enforcement and prosecution practices. It is the position of the joined states that the decision of the Wisconsin Supreme Court was well grounded in logic and in law, and follows this Court's established precedent. Its decision should be affirmed.

ARGUMENT

The amicus states support the decision of the Wisconsin Supreme Court in the case under review and urge the Court to adopt the rationale espoused by that court. In addition, the amicus states wish to point out the potentially adverse practical consequences of a contrary ruling.

The Petitioner urges this Court to adopt the rule of *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117 (7th Cir. 1987), *cert. denied,* 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 745 (1987), that a criminal defendant's acceptance of sixth amendment counsel automatically triggers an invocation of the right to counsel under the fifth amendment. Such a holding is unworkable as well as unnecessary in light of this Court's jurisprudence. *Espinoza* is based on two premises, both drawn from *Michigan v. Jackson,* 475 U.S. 625 (1986): the first, that an individual "has invoked the full extent of his or her constitutional right to counsel" and, second, that an accused is unable to distinguish which constitutional right he is invoking.

While these principles when viewed in isolation seem unobjectionable, they would, if carried to their logical extension, completely eliminate the important distinctions between the fifth and sixth amendment rights to counsel. Such a holding would effectively graft an entire body of law relating to the fifth amendment onto the sixth amendment analysis. Such a result is unnecessary and unwise.

The distinctions between the fifth and sixth amendment rights to counsel are settled and familiar. The fifth amendment right is a prophylactic rule which protects the privilege against self-incrimination. *Solem v. Stumes,* 465 U.S. 638, 644 n. 4 (1984). The rule is designed to protect against the inherent coerciveness of custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966). The sixth amendment right,

on the other hand, does not attach until the initiation of adversarial proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer v. Williams,* 430 U.S. 387 (1977). It was the sixth amendment right which the Court addressed in *Jackson.* There, the defendants in two separate cases, requested counsel at their arraignments but were reinterrogated and confessed before they could consult with their attorneys. While this Court analogized to its fifth amendment rationale in *Edwards v. Arizona,* 451 U.S. 477 (1981), it expressly *refused* to cast its opinion in fifth amendment terms. *Jackson, supra,* at 630 n. 4.

The assertion of the *Jackson* petitioners was that the right to counsel under the sixth amendment guaranteed counsel at all critical proceedings — including interrogation — following arraignment. The State's position was that it applied only in "formal" proceedings. It was in the context of this debate that the Court found that the "settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. ..." *Jackson, supra,* at 633.

When this language is thus viewed against its proper background, it becomes clear that the *Espinoza* court interpreted it far too sweepingly. While the *Jackson* court gave an expansive scope to the sixth amendment right to counsel, nothing in the opinion even hints that its invocation is equivalent to an invocation of the fifth amendment right.

The second premise upon which *Espinoza* rests is that a defendant is unable to discern between the fifth and sixth amendment rights to counsel, therefore invocation, or even passive acceptance of, the sixth amendment right must be construed as a request under the fifth amendment. This argument misunderstands both the fundamental differences in the nature of the fifth and sixth amendment rights

and the role of the courts in determining the scope and extent of constitutional rights.

The fifth amendment "right" to counsel, as previously discussed, is not a true right but a protection against the inherent compulsion associated with custodial interrogation. It is designed to protect an individual's *choice* to speak or remain silent. The sixth amendment right to counsel, on the other hand, is a constitutional *guarantee.* While it is possible to waive this right, numerous procedural steps must be taken to do so and, even then, the state may appoint standby counsel. *Faretta v. California,* 422 U.S. 806 (1975); *United States v. Fant,* 890 F.2d 408 (11th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1498, 108 L.Ed.2d 644 (1990).

To equate the two rights would be to transform a safeguard of individual choice into a deprivation thereof because, by appointing sixth amendment counsel, the state would effectively make the defendant's fifth amendment election for him. There is neither the need nor the precedent to support such action.

Nor does the fact that a defendant is ignorant of the nature of his rights lead to a different conclusion. It is the courts which determine which constitutional rights apply in a given circumstance and the extent and scope of those rights. The defendant's ability to "understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel" is therefore not a factor in this constitutional equation.

The issue is whether the defendant has evidenced a discernible desire not to be questioned without counsel present, as opposed to a desire to have an attorney to assist in the preparation of his defense. This is quite clearly a distinction the criminal defendant *is* able to make. More important, it is one that a *defendant* must elect to exercise. There is no reason to believe that a defendant who has been advised of

his *Miranda* rights, and not seen fit to request counsel during interrogation, exercised that right *merely* by accepting counsel for trial.

The practical impact of reversal in this case would be enormous. Such a ruling would require that after any formal adversarial proceedings were initiated as to *any* crime, the police would be unable to initiate questioning even as to unrelated, uncharged, crimes unless counsel is present. *Minnick v. Mississippi,* Case No. 89-6332, (Decided December 3, 1990). Thus, although a defendant may initially have waived *Miranda* and freely and voluntarily confessed to a crime with which he is charged, if he accepts counsel to represent him at trial the police must wait for him to volunteer further information. Indeed, to further suggest counsel will freely allow a defendant to speak to the police avoids the reality of criminal defense litigation. Since neither of these two possibilities is likely to occur, the practical effect of an adoption of *Espinoza* would be to completely foreclose questioning after the sixth amendment rights attach.

The implications for such a rule would be particularly grave for any state which, by its own law, affords criminal defendants enhanced protection under the sixth amendment.

It is state law which determines at what point adversarial proceedings commence and, therefore, at what time the sixth amendment right to counsel attaches. *Moore v. Illinois,* 434 U.S. 220, 228 (1977); *Felder v. McCotter,* 765 F.2d 1245, 1247 (5th Cir. 1985), *cert. denied,* 475 U.S. 1111 (1986). A state could theoretically expand a defendant's sixth amendment protection by deeming the adversarial process to begin at some very early stage in the proceedings, perhaps as early as arrest. To the extent it offered this greater protection, however, the state would be penalized by

the concomitant and automatic triggering of a defendant's fifth amendment rights. A holding in accord with *Espinoza* thus would not only hinder a state's present law enforcement practices, but would act as a disincentive for the states themselves to expand individual rights.

The Wisconsin Supreme Court correctly interpreted the scope and purpose of the fifth and sixth amendment rights to counsel. In addition, such interpretation avoids the untoward and potentially unforeseen pitfalls of the *Espinoza* rationale.

Accordingly, the states joined herein as amici curiae respectfully urge this Court to affirm the Petitioner's conviction.

CONCLUSION

The states joining this brief submit that the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted

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INTEREST OF AMICUS CURIAE

The People of the State of Illinois as amicus curiae have a compelling interest in the outcome of this case because the rule sought by Petitioner, while providing no needed benefit to criminal defendants, would jeopardize non-coercive police practices as well as prosecutions and convictions in numerous serious cases in this State.

ARGUMENT

I.

A RULING ADVERSE TO THE STATE WOULD JEOPARDIZE MANY INVESTIGATIONS, PROSECUTIONS, AND CONVICTIONS FOR SERIOUS CRIMES.

This Court is being asked in this case to require a *per se* protective rule which criminal defendants already have at their disposal simply by invoking their rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); this heightened protection would assist only those defendants who have never expressed a desire for it – and might even cover cases of those who have expressly waived it by confessing to the charge which brought them into custody – since those who have asked for counsel during interrogation on any charge are already protected under *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093 (1988); and this unnecessary protection would come at great expense to the states. This is a critical case: its resolution will affect a large number of Illinois cases involving particularly heinous crimes.

For at least seven years police and prosecutors in Illinois have obtained and utilized confessions like

McNeil's pursuant to the Illinois Supreme Court's holding that an incarcerated individual's acceptance of counsel at a preliminary hearing on one charge does not implicate the Fifth Amendment for purposes of a separate investigation. *See People v. Martin*, 102 Ill. 2d 412, 466 N.E.2d 228, 229, 233, *U.S. cert. denied*, 469 U.S. 935 (1984) (reaffirmed in dicta in *People v. Kidd*, 129 Ill. 2d 432, 544 N.E.2d 704, 713 (1989)). Thus, within the last several months alone, the issue of admission of confessions to unrelated crimes after appointment of counsel on initial charges has arisen in at least seven cases decided by or pending in the Illinois appellate courts[1]. Two of these cases are capital, one involving the murder of ten children. All the convictions are for murder or manslaughter. Adoption of the rule advocated by Petitioner would jeopardize these convictions as well as untold numbers of prosecutions and pending and future investigations.

The significant number of cases in which police obtain a confession to an unrelated crime after a defendant appears with counsel for a court appearance reflects two practical realities: the natural course of legitimate non-coercive police investigation and the nearly universal invocation of the Sixth Amendment right to counsel by individuals charged with a crime. With regard to

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[1] *People v. Bryant*, ___ Ill. App.3d ___, 559 N.E.2d 930, 934-8 (1st Dist. 1990); *People v. Jackson*, 198 Ill. App.3d 831, 556 N.E.2d 619, 624-8 (1st Dist. 1990); *People v. Maxwell*, No. 67022 (pending before Illinois Supreme Court); *People v. Maust*, No. 88-2109 (pending before Appellate Court of Illinois); *People v. Coleman*, No. 86-409 (pending before Appellate Court of Illinois); *People v. Hunt*, No. 89-1670 (pending before Appellate Court of Illinois).

police investigations, once a person is brought into custody, proper police work requires that the police focus their attention on that individual, gather and examine identifying evidence such as fingerprints, consult acquaintances, and often consequently find a missing link, see a serial pattern, or discover a separate crime from that which brought the individual to their attention. Since the police can retain suspects only briefly absent pending charges,[2] they are likely to charge the first crime for which they have proof despite the potential for discovery of other, perhaps more serious offenses which may take longer to unearth or investigate.

Indeed, in many cases, the later-discovered crimes are as serious as or more serious than the one for which the individual is initially charged. For instance, in the capital case of *People v. Maxwell*,[3] police arrested the defendant upon his commission of several armed robberies from which he netted a car and $110; more than a week later the police discovered that defendant had shot and killed a robbery victim the previous month. In *People v. Jackson*, 556 N.E.2d at 621, two days after the defendant's arraignment for home invasion and rape, acquaintances gave the police evidence that the defendant had also murdered two women.

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[2] For example, the Chicago Police Department's general orders require that an arrestee be taken to court within 24 hours of arrest. Teletype Order 415, January 14, 1986. This order was implemented to comply with this Court's opinion in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1973).

[3] No. 67022 (pending before the Illinois Supreme Court), Trial Record at 53, 157-9, 171-5, 178-9, 1041-44, 1065-76.

Coupled with the potential discovery of multiple crimes and the need to press charges quickly is the fact that, upon being charged with any one crime, defendants obtain counsel as a matter of course. Courts scrupulously dissuade individuals from facing prosecution without counsel, and by statute, Illinois judges routinely, and often *sua sponte*, appoint counsel upon an indigent individual's first court appearance following arrest. *See* Ill. Rev. Stat. ch. 38, secs. 109-1(b)(2), 113-3. For instance, in *People v. Maxwell*, the defendant and his co-defendants spoke just one word each prior to the court's appointment of counsel on its own initiative at their preliminary appearance:

> THE COURT: Each of you are charged with robbery. Armed robbery and attempt armed robbery. Do any of you have your own lawyers or any money to hire a lawyer?
>
> [DEFENDANT HOWARD]: No.
>
> [DEFENDANT MAXWELL]: No.
>
> [DEFENDANT THOMPSON]: No.
>
> THE COURT: A Public Defender is appointed for each of you three defendants.[4]

Hence, practically speaking, in every case in which police discover an individual's involvement in other crimes after filing one charge, the individual has already obtained counsel. As a result, the rule sought by Petitioner would require finding a Fifth Amendment invocation in every such case. As will be shown, however, the fact that an individual has counsel should be presumed to

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[4] No. 67022 (pending before Illinois Supreme Court), Trial Record at 94.

result from the State's formal accusation initiating prosecution and not to reflect the suspect's preference as to how to handle police interrogation on unrelated, uncharged offenses.

II.

ACQUISITION OF COUNSEL ON UNRELATED CHARGES DOES NOT IMPLICATE THE *EDWARDS* CONCERN.

The rationale of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), is that protection of the Fifth Amendment right against self-incrimination from the "inherently compelling pressures" of custodial interrogation requires a presumption that once a suspect has indicated inability to deal *with those pressures* absent counsel, any subsequent uncounseled confession initiated by the police is a product of explicit or subtle compulsion. *See Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 2097-8 (1988); *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 494 (1984). This rationale has no bearing on multiple crime investigations in which the invocation of the right to counsel does not occur in the context of custodial interrogation but rather reflects the need for an accused to be represented by a lawyer during the course of a formally initiated prosecution.

As in the *Maxwell* hearing quoted above, Illinois courts typically appoint or ensure retention of counsel for charged individuals *pro forma* at preliminary hearings. In so doing, the courts make no explicit or implied determination that the defendant is incapable or feels incapable of handling custodial interrogation without an

attorney. The obtaining of counsel occurs *without regard* to whether the accused is continuously incarcerated, to be released, or at liberty. Since counsel are retained or appointed equally for individuals at liberty and for those in jail, and equally for those prisoners interrogated by police and those who are not, it defies logic to interpret the receipt of counsel as an invocation of *Miranda*, which "extraordinary safeguard 'does not apply outside the context of the inherently coercive custodial interrogation for which it was designed.' " *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S.Ct. 1136, 1144 (1984) (citation omitted).

The judicial practice of ensuring representation on pending charges reflects the *Sixth* Amendment concern that once charged with a crime, "the average defendant does not have the professional legal skill to protect himself[.]" *Johnson v. Zerbst*, 304 U.S. 458, 462-3, 58 S.Ct. 1019 (1938). Such judicial intercession stands in contrast to the complete lack of involvement by courts during custodial interrogation when individuals routinely choose and are deemed capable of choosing to talk to the police without counsel. Where the court appoints counsel, the implicit purpose and hence scope of appointment is for representation on a particular charge, not for a blanket provision of services on any legal matter that might arise – divorce, will-drafting, or representation on an unrelated uncharged crime.

From the defendant's perspective as well as the court's, self-incrimination with respect to a separate crime cannot logically be deemed the motivating concern behind obtaining counsel on a charged crime. The category of defendants at issue in this case consists solely of those who have *not* expressed the need for counsel to

deal with custodial interrogation; those who have are protected under *Roberson*. Hence, the relevant defendants either have waived *Miranda* and confessed to the initial charge, invoked the right to remain silent but not requested an attorney, or have not as yet been questioned by the police.

As these defendants stand in court, they are surely not focusing on the possibility of subsequent interrogation by the police about an unrelated charge. The typical fact pattern in these cases is that the defendants never – in court, before, during or after interrogation – express concern that they cannot handle the pressure of custodial interrogation without legal assistance. Upon receiving *Miranda* warnings from the police prior to interrogation on the separate offense after their court appearance on the initial charge, these defendants do not mention to the police that they have an attorney, request an attorney, or ask to call an attorney, and when permitted to use the phone, do not call an attorney.[5] These facts demonstrate not that the defendant's will has somehow been overborne by the mere administration of *Miranda* warnings after a court appearance with a lawyer on a separate charge, but rather that even suspects who have a particular attorney whom they have seen act on their behalf in court will often choose with a free will to deal with the police when a separate crime comes to light.

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[5] *E.g.*, *People v. Maxwell*, No. 67022 (pending before Illinois Supreme Court), Trial Record at 276-7, 340, 394, 400, 450, 460, 464; *People v. Kidd*, No. 66609 (pending before Illinois Supreme Court), Trial Record at 66, 70, 77, 94, 101, 122-3, 127, 136-7, 139, 143-4, 146, 148, 150, 151.

In some cases, indeed, the defendant clearly demonstrates a distinct attitude toward involvement of counsel for Fifth and Sixth Amendment purposes by willingly talking to the police without counsel about the initial crime and then accepting counsel once charged. In *People v. Kidd*, No. 66609 (pending before the Illinois Supreme Court), for instance, the defendant confessed to several murders, was charged therefor, retained counsel on those charges, and then waived his *Miranda* rights again before confessing to killing ten other children.[6] Clearly in such cases the defendant's acquisition of counsel does not result from a perceived inability to deal with police questioning. To so interpret the retention of counsel would deprive the defendant of the right to decide whether to cooperate with the police.

Significant distinctions exist from a defendant's self-interested perspective between questioning about a pending charge and questioning about an unrelated investigation. Before indictment, a suspect might want to talk to the authorities, perhaps to clear himself of the charge or reduce his exposure by revealing more culpable offenders. The incentives to talk to the police diminish

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[6] *See People v. Kidd* ("Kidd I"), 129 Ill.2d 432, 544 N.E.2d 704, 704-5 (1989). The same pattern of a *Miranda* waiver on the initial charge, acquisition of counsel upon arraignment, and subsequent *Miranda* waiver on an unrelated charge, occurred in *People v. Jackson*, 198 Ill. App.3d 831, 556 N.E.2d 619, 621-2 (1st Dist. 1990). Although such cases might not be governed by a ruling against Wisconsin in this case, they demonstrate the senselessness of interpreting the acquisition of counsel as a Fifth Amendment invocation.

post-indictment, when the government is committed to prosecute:

> [T]he return of an indictment . . . presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case. As a result, any further interrogation can only be designed to buttress the government's case; authorities are no longer simply attempting "to solve a crime."

Patterson v. Illinois, 487 U.S. 285, 101 L.Ed.2d 261, 108 S.Ct. 2389, 2402 (1987) (Stevens, J., dissenting) (citations omitted).

In addition, a suspect in custody pursuant to a single investigation is aware of the investigation and its nature and can initiate renewed communications if he wishes. Extending the *Edwards* rule to an unrelated investigation would in practical terms deprive the suspect of knowledge of the very existence of the new investigation, since police know that in reality contact through defense counsel is likely to be futile. The prospect that an informed, unrepresented defendant would choose to cooperate justifies a simple inquiry to ascertain his wishes.

Such an inquiry carries no coercive force. Where the defendant has not expressed the need for counsel during custodial interrogation, the *Edwards* protection is unnecessary because the balance of power between suspects and police is the same as where only one charge is involved. The police still have only one opportunity to interrogate the incarcerated suspect unless the suspect proves willing to submit to more, and must precede questioning with *Miranda* warnings. The suspect need only inform his interrogators that he wishes the assistance of counsel to prohibit further contacts.

In summary, the rule proposed by Petitioner in this case requires a judicial fiction as to the meaning of acquiring counsel on a pending charge, a fiction without support in the rationale of the *Edwards* rule. Where the purpose of obtaining counsel is to protect a defendant's Sixth Amendment interests on pending charges, without relation to the fact that the defendant is incarcerated and unmotivated by police interrogation, "[t]o conclude that [a defendant] invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of [the defendant's] statement." *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 832 (1987). Such disregard would disserve not only the State's interest in using properly obtained evidence, but the interest of suspects in controlling the exercise of their rights:

> Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny – not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused "knowingly and intelligently" pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial.

Patterson v. Illinois, 108 S.Ct. at 2394.

While in hindsight defendants may not be pleased with the outcome of their election to "go it alone" during custodial interrogation, this Court should interpret the acquisition of counsel on an initial charge for what it clearly is at the time – an invocation of the Sixth Amendment right to counsel on a pending charge – and nothing more. Defendants have ample opportunity to choose

freely whether to invoke the Fifth Amendment *Miranda* right upon receiving the *Miranda* warnings prior to questioning by the police about separate charges.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court affirm the decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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No. 90-5319

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL McNEIL, Petitioner,

v.

STATE OF WISCONSIN, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF RESPONDENT

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BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, and George W. Kennedy, District Attorney of Santa Clara County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3, Rules of the Supreme Court of the United States.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Santa Clara County. Upon review of the instant matter -- which raises the question of the permissibility of police-initiated interrogation of a suspect on uncharged offenses following his appearance with counsel on a charged case, or his in-court request for counsel on that

case -- the Committee, including a representative of the District Attorney of Santa Clara County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. *Amicus* also believes that the *amicus curiae* brief presently submitted with the consent of all parties of record "brings relevant matter to the attention of the court that has not already been brought to its attention by the parties" in that the brief submitted by *Amicus* focuses upon the adverse impact of the rule sought by Petitioner upon legitimate law enforcement activities. Rule 37.1, Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In practice, the rule sought by Petitioner would be routinely invoked through the appearance of suspects in custody with counsel, or through dialogue between the court and an accused at early stages of criminal proceedings. Given new and pending technology -- through which law enforcement is increasingly able to learn that an individual in custody may have been involved in an unsolved crime -- the rule sought by Petitioner would have broad impact. The prohibition against questioning individuals who have simply appeared with counsel, or indicated a desire for counsel in a pending case, would be invoked in situations where an individual has never demanded counsel during interrogation and would be advised, prior to questioning, of his rights under the *Miranda* decision. In this context, the

rule sought by Petitioner would needlessly burden investigation of numerous crimes, impacting upon law enforcement in a fashion not envisioned in prior decisions of the Court, and without the justification previously found for extending the "prophylactic rules" protecting constitutional rights.

ARGUMENT

I

THE ADVERSE IMPACT OF THE RULE SOUGHT BY PETITIONER IS SUBSTANTIAL AND NOT JUSTIFIED BY A NEED TO FURTHER SAFEGUARD CONSTITUTIONAL RIGHTS OF AN ACCUSED

Petitioner herein asks this Court to announce a bright line rule: "A defendant who at an initial appearance or similar proceeding requests counsel or appears with counsel may not be questioned by police while he remains in continuous custody unless the defendant himself initiates

interrogation." Petitioner's Brief, page 30.

In essence, Petitioner asks this Court to extend the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), which concerned interrogation about a charged crime after the accused had requested counsel at arraignment. There, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right ~~to~~ counsel for that police-initiated interrogation is invalid." *Id.*, at 636.

According to Petitioner, this extension of the rule of *Michigan v. Jackson* would be consistent with *Arizona v. Roberson*, 486 U.S. 675 (1988), which applied *Edwards v. Arizona*, 451 U.S. 477 (1981), to prohibit police, after a suspect requests counsel during custodial

interrogation, from initiating questioning about any other occurrence. Under *Minnick v. Mississippi*, 498 U.S. ___, 111 S.Ct. 486 (1990), the rule sought by Petitioner would presumably bar any police-initiated questioning on unrelated, uncharged crimes outside the presence of counsel, once an individual has appeared with an attorney or indicated in court a desire for representation.

The rule sought by Petitioner is not one of Constitutional command, but represents a potential extension of "prophylactic standards" adopted by the Court to safeguard the Fifth Amendment privilege against self-incrimination. In announcing prior rules of a prophylactic nature, this Court has found any adverse impact upon law enforcement outweighed by the need to safeguard constitutional values. In the context of the present

matter, however, the adverse impact upon law enforcement is substantial, and not justified by the need to further safeguard the right against self-incrimination, or the right to counsel.

A.

Because Individuals Charged With Serious Crimes Routinely Appear Early With Counsel, Or Indicate In Court A Desire For Representation, The Rule Sought By Petitioner Would Have Broad Impact Upon Law Enforcement

Under the Sixth Amendment, "a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him -- 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The right to counsel under the Sixth Amendment exists at every "critical stage" of a criminal proceeding. *White v. Maryland*, 373 U.S. 59, 60 (1963).

The States have enacted various procedures to enforce the Sixth Amendment right to counsel. When a person is charged with a serious offense, these procedures routinely result in the early appearance of counsel, or an indication by the accused of a desire for representation in the case. For instance, in California, Penal Code section 987 requires that defendants appearing at arraignment without counsel be informed of the right to representation. In capital cases, the court must tell the individual that representation is required, and must inquire about the retention or appointment of counsel. Cal. Penal Code sec. 987(a). With regard to noncapital cases, the statute provides:

> ". . . if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of

> counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him." Cal. Penal Code sec. 987(b).

Analogous provisions exist in most jurisdictions, leading in serious cases to the early appearance of counsel, or the early indication of a desire for counsel on the charge.[1] At the very least, the

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[1] See, Ala. Code sec. 15-12-20 (1975) (trial judge required before arraignment to ascertain from accused whether he or she desires assistance of counsel); Alaska Crim. R. 39(a) (if appearing at arraignment without an attorney, the accused must be asked if he desires the aid of counsel); Ariz. Crim. Pro. R. 4.2 (at the "initial appearance", the magistrate must inform of the right to counsel, and appoint counsel if the accused is eligible and so requests); Ark. Stat. Ann. sec. 16-85-703 (1987) (if any person is to be arraigned on a felony without counsel, it is the duty of the court to inquire and appoint an attorney); Colo. R. Crim. Pro. 5(a)(2) (at "first appearance" of accused, court must inform of rights to counsel and appointed counsel); Conn. Gen. Stat. Ann. secs. 54-1b, 54-63c (1958) (defendant must be informed of rights at arraignment); Del. Super.Ct.Crim.R. 44(a) (advice and appointment of counsel at appearance in

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superior court); D.C. Sup. C. Crim. R. 44-I (appointment of counsel for proceedings before that court); Fla. R. Crim. Pro. R. 3.111 (appointment of counsel at formal charging, first appearance before magistrate, or as soon as feasible after custodial restraint, whichever occurs earliest); Ga. Code Ann. sec. 27-3315 (1981) (appointment of counsel for indigent defendants); Haw. Rev. Stat. secs. 802-2, 802-5 (1985) (if accused entitled to counsel, court shall inform of right and appoint if indigent); Idaho Code secs. 19-852, 19-853 (1987) (duty of court to clearly inform of right to counsel upon formal charge or hearing); Ill.Rev.Statutes ch. 38, secs. 113-1, 113-3 (1973) (allowance and appointment of counsel prior to plea); Ind. Code Ann. sec. 35-33-7-5 (accused must be informed of right to counsel and assigned counsel where appropriate at "initial hearing"); Iowa Code Ann. sec. 813.2 and Iowa R. Crim. P. 2 and 26 (court shall inform of rights to counsel and appointed counsel at "initial appearance"); Kansas Stat. Ann. sec. 22-4503 (1980) (if accused appears at any stage of proceeding without counsel, court has duty to inform and appoint); Ky. R. Crim. Pro. 3.05 (at time of appearance, court shall inform of right to counsel, and, if confinement possible, shall appoint counsel unless defendant declines); La. Code Crim. Pro. secs. 230, 230.1 (right to counsel or appointed counsel from time of arrest; duty to bring arrested person in custody before judge within 72 hours for purpose of appointment of counsel); Me. Rev. Stat., tit. 15, sec. 810 (1982) and

Me. R. Crim. Pro. 44 (before arraignment on felonies, assignment of competent counsel); Md. Code Ann., tit. 4, Md.R.C.C. 4-213, 4-202(a) (when accused appears before judicial officer, court must require accused to read notice of right to counsel); Mass. R. Crim. Proc. 7(a) (at an initial appearance, if the court finds defendant cannot afford counsel and desires representation, counsel shall be assigned or appointed); Mich. G.C.R. 1963 785.4 (at arraignment, court must personally advise defendant of right to counsel, and appoint counsel if requested; at each subsequent proceeding, accused must have counsel or reaffirm waiver); Minn. Stat. Ann. sec. 49, R. Crim. Pro. 5.01(b) (West 1990) (at initial appearance, defendant without counsel advised of rights, and counsel appointed if defendant indigent); Miss. Code Ann. sec. 99-15-15 (1972) (accused has right to counsel at every critical stage of proceeding, and court may appoint, interpreted in *Conn v. State*, 251 M. 488, 170 So.2d 20 to require appointment if defendant indigent); Mo. R. Crim. Pro. 24.02(b) (before plea, court must inform unrepresented defendant of rights to counsel and appointed counsel); Mont. Code Ann. sec. 46-12-202 (1989) (if defendant appears for arraignment without counsel, court must advise of rights to counsel and appointed counsel); Neb. Rev. Stat. sec. 29-1804.05 (at first appearance of accused in felony or misdemeanor subject to imprisonment, court shall inform of right to counsel and, if defendant asserts indigency, make inquiry and appoint if appropriate); Nev. Rev. Stat. sec. 171.186

(prior to preliminary hearing, court shall advise defendant of right to counsel and appointed counsel); N.H. Rev. Stat. Ann. (1986) 604-A:2 (if defendant appears without counsel, court shall advise of rights and follow procedures for determination of indigency unless defendant waives appointment); N.J. Crim. Prac. R. 3:2-3 (at first appearance, magistrate shall advise of right to counsel and, if defendant is indigent, shall commence procedures for appointment, unless defendant affirmatively states his intention to proceed without counsel); N.M. R. Crim. Pro. M. C. 8-501 (5) & (6) (upon first appearance, court must inform defendant of rights to counsel and appointed counsel); N.Y. Crim. Pro. Law sec. 170.10 (4) (at arraignment, court must inform defendant of rights to counsel and "must itself take such affirmative action as is necessary to effectuate them."); N.C. Gen. Stat. sec. 15A-942 (1984) (at arraignment, court shall inform unrepresented defendant of right to counsel, must afford opportunity for exercise of right, and must take action necessary to effectuate that right); N.D. R. Crim. Pro. 10, 44 (at arraignment, court must inform unrepresented defendant of rights to counsel and appointed counsel); Ohio R. Crim. Pro. 10(c) (when defendant brought before court without counsel, and called upon to plead, court shall determine that he understands rights to counsel and appointed counsel); Okla. Stat. Ann., tit. 22, sec. 464 (at arraignment, defendant without counsel must be informed of rights to counsel, and counsel appointed if

appropriate); Or. Rev. Stat. sec. 135.040 (at arraignment, defendant without counsel shall be informed of right to counsel and asked if he desires aid of counsel); Pa. R. Crim. Pro. 303, 42 Pa.C.S.A. (as indicated by comment of leg. committee, a main purpose of arraignment is "to consider defendant's right to counsel" if he is unrepresented); R.I. S.C. Crim. R. and D.C. Crim. R. 44 (if defendant appears without counsel, court shall advise of right to counsel and appoint counsel unless defendant is able to retain attorney or elects to proceed without counsel); S.C. Code Ann. sec. 17-3-10 (1976) (any person entitled to counsel under the laws of the United States shall be advised of that right and "if it is determined that the person is financially unable to retain counsel then counsel shall be provided); S.D. Codified Laws Ann. sec. 23 A-40-6 (1988) and *Warner v. Jamison*, 77 S.D. 340, 91 N.W.2d 743 (1958) (when accused appears at arraignment, he is required to demand or waive counsel immediately); Tenn. Code Ann. sec. 40-14-202 (1990) (in felony cases, court must follow procedure for determination of indigency and advisement of right to counsel); Tex. Crim. Pro. Code Ann, Art. 26.04 (at arraignment, court must inform of right to counsel and appoint counsel if defendant indigent); Utah Code Ann. sec. 77-32-2 (1953) (counsel assigned to represent each indigent person under arrest if defendant requests or court orders and defendant does not affirmatively waive or reject opportunity for representation); V. R. Cr. P. 5 (d) & (e) (when accused brought before judicial

practice of the various courts will, in most instances, require police to assume that a person accused of a serious crime has either appeared with counsel, or indicated in some fashion -- very probably

officer, he shall be informed of right to counsel and appointed counsel and until defendant consults with counsel, no further proceedings unless he waives right to attorney); Code of Va. sec. 19.2-157 (if defendant appears without counsel in case punishable by death or imprisonment, court shall inform of rights to counsel and appointed counsel and allow reasonable opportunity to employ or execute statement of indigency); Wash. Sup. C. Crim. R. 3.2 (A) (at preliminary appearance, court shall orally inform defendant or rights to counsel and appointed counsel); W. Va. Code. sec. 62-1-6 (1966) (at initial appearance, duty of magistrate to inform defendant of right to counsel and to afford opportunity for consultation); Wis. Stat. Ann. sec. 970.02 (at initial appearance, court shall inform unrepresented defendant of right to counsel and, if defendant claims or appears to be indigent, shall refer for determination); Wyo. R. Crim. P. 6 (right to counsel at every stage of proceeding from initial appearance through appeal unless defendant waives such appointment).

in response to inquiry from the court -- that he desires representation.

Thus, in practice, the rule sought by Petitioner would have broad impact upon law enforcement activities. Application of the rule would not be confined to situations where an accused has taken action on his own to demand counsel to intercede between him and the state. The prohibition sought by Petitioner would be triggered routinely in cases involving serious charges, casting a wide net upon the ability of police to question individuals in custody about unrelated matters without the presence of counsel.

B.

The Rule Sought By Petitioner Would Impede Investigation Of Unsolved Crimes, Without Sufficient Justification

In a growing number of situations, law enforcement discovers that an individual

booked on one crime may be involved in a separate matter. As noted by Justice Kennedy in his dissent to *Arizona v. Roberson*, "[w]hen a suspect is in custody for even the most minor offense, his name and fingerprints are checked against master files." 486 U.S. at 689. "It is a frequent occurrence that the suspect is wanted for questioning with respect to crimes unrelated to the one for which he has been apprehended." *Id.*

With the development of more sophisticated means to "match" arrested individuals with those wanted for questioning on other matters, the number of situations in which police desire to question about other matters will surely increase. For instance, in California, the California Identification (Cal-ID) System's Remote Access Network permits statewide access to computerized fingerprint

databanks, facilitating the location and identification of suspects. Access to similar information from the records of nine Western States will soon be routinely available in California, followed in the foreseeable future by access to nationwide databanks.

As noted above, under the rule sought by Petitioner, law enforcment would be required to work with the substantial probability that an individual in custody on a serious offense has invoked the right to counsel. If the procedures of a particular jurisdiction are such that the accused may *not* yet have done so, police would presumably be required to ascertain whether the individual has appeared with counsel, or indicated a desire for representation at a court appearance. See, *Michigan v. Jackson*, 475 U.S. 625, 634 ("One set of state actors (the police) may

not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).") Given the volume of cases in many criminal jurisdictions, this requirement may represent more than a minimal undertaking, particularly where the law enforcement officer seeking to question the individual is handling a separate matter, and is not likely to have appeared at arraignment, or to be involved in the processing of the other charge through the courts.

In the many cases where the individual has appeared with counsel, or requested counsel, application of the rule of *Minnick v. Mississippi* would bar police-initiated interrogation absent the physical presence of counsel. In cases where the individual has never expressed a request for representation during *interrogation*, and would be warned of his rights under the

Miranda decision, police would nonetheless be required to locate and wait for counsel, even in situations where the individual may be willing to discuss the separate matter without an attorney. In addition to the time spent by law enforcement officials on this requirement, and the attendant delay, the requirement of presence of counsel may needlessly burden the time of the attorney for the defendant, where the individual has never indicated a desire for representation during interrogation. If the attorney has been appointed by the state, the governments providing counsel would also be burdened through added expenditures in compensating attorneys, in situations where the accused has not indicated at any point a desire for representation during questioning by police.

In *Michigan v. Jackson*, the Court rejected arguments regarding burdens upon

law enforcement where police cannot initiate interrogation on a charged offense following a request for counsel at arraignment. Under the rule sought by Petitioner, however, the burdens upon police are more sweeping. In the *Michigan v. Jackson* situation, police have already arrested the individual on the particular crime, and a prosection has commenced. By that stage, law enforcement can be expected to have performed routine factual investigation of the matter, including preliminary discussions with the suspect if the suspect is willing to provide information. Thus, any burdens associated with prohibition against *further* questioning are alleviated by the ability of police to investigate their case prior to arrest and the commencement of charges.

In the case of uncharged, unrelated offenses, however, police often do not know

about the other matter until *after* the person has been arrested and booked on the offense. Under those circumstances, a prohibition against police-initiated questioning would affect cases in which police have not had the opportunity even to pose preliminary questions to the individual. Particularly in cases where there appears to be a "match" between an individual in custody and a person suspected of involvement in another crime, the entire matter may be resolved through a few preliminary questions. For instance, the individual may be able to explain in a few words that he is not the other person, or was not in the place where the other crime occurred. Where the individual has not indicated any desire for counsel during questioning, it is difficult to justify a rule that does not permit police even to ask the individual outside the presence of

counsel if he wants to discuss the unrelated matter.

In *Arizona v. Roberson*, the Court rejected arguments referencing the practical realities of law enforcement and an individual's likely response to interrogation. In that case, Justice Kennedy pointed out in dissent that a "realistic view of human nature suggests that a suspect will want the opportunity, when he learns of the separate investigations, to decide whether he wishes to speak to the authorities in a particular investigation with or without representation." 486 U.S. at 692. The majority's justification for rejecting this premise was, of course, the prior assertion by the individual of a desire for representation *during interrogation*. According to the Court, any interrogation, even on an unrelated matter, of "a suspect

who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel . . . will surely exacerbate whatever compulsion to speak the suspect may be feeling." 486 U.S. at 686.

Unlike the situation in *Arizona v. Roberson*, the situation now before the Court does not involve an individual who has "indicated his inability to cope with the pressures of custodial interrogation by requesting counsel." There is not, therefore, the same constitutional interest justifying the impediment placed upon law enforcement by the rule sought by Petitioner. Where the individual has never requested counsel during interrogation, there is no increased danger of "badgering" or "loosening up" through questioning about a separate matter. Where the accused will be read his *Miranda* rights prior to any

custodial interrogation, there is no reason to believe he will be unable to demand an attorney or refuse to answer questions relating to uncharged matters.

In *Arizona v. Roberson*, Justice Kennedy argued in dissent that constitutional interests did not justify the rule adopted in that case. His words apply with force to the present situation:

> "[T]he rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion. Our justification must be consistent with the practical realities of suspects' rights and police investigations." *Arizona v. Roberson*, 486 U.S. 675, 688.

Drawing further upon the words of Justice Kennedy, Amicus submits that the rule sought by Petitioner "is not necessary to protect the rights of the suspects, and it will in many instances deprive our nationwide law enforcement network of a

legitimate investigative technique now routinely used to resolve major crimes." *Id.*

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the rule sought by Petitioner should be rejected, and the judgment of the Wisconsin Supreme Court upholding his conviction affirmed.

Dated at San Jose, California, January 10, 1991.

Respectfully submitted on behalf of the Appellate Committee of the California District Attorney's Association, and the District Attorney of Santa Clara County

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